Supreme Court, U.S.
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In The
Supreme Court of the United States

WYOMING SAWMILLS, INC.,

Petitioner,

v.

UNITED STATES FOREST SERVICE; MICHAEL JOHANNS, Secretary of Agriculture; DALE BOSWORTH, Chief, United States Forest Service; RICK CABLES, Regional Forester, Region II; and BILL BASS, Forest Supervisor, Bighorn National Forest;

and

MEDICINE WHEEL COALITION ON SACRED SITES OF NORTH AMERICA,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether a timber company has Article III standing to challenge, as a violation of the Establishment Clause, a United States Forest Service decision to manage 50,000 acres of a national forest as a "sacred site" because of "a resurgence of Native American spiritualism and [the area's] religious importance to American Indians," where the timber company is:

   a. Denied the opportunity to bid for timber sales within that area, and

   b. "Directly affected" by management of the area as a "sacred site"?

2. Whether the United States Forest Service violated the Establishment Clause when it decided to manage 50,000 acres of a national forest as "of religious importance to American Indians" and excluded all human activity but their own from that "sacred area"?

LIST OF PARTIES

Wyoming Sawmills, Inc. ("Wyoming Sawmills"), a corporation organized under the laws of the State of Wyoming, was Plaintiff in the United States District Court for the District of Wyoming and Appellant before the United States Court of Appeals for the Tenth Circuit. Wyoming Sawmills has no parent or subsidiary corporations. In accordance with Supreme Court Rule 29.6 Wyoming Sawmills is a private corporation owned by Allied Forced Products, Inc., its parent corporation.

The following or their predecessors were Defendants in the District Court and Appellees before the Tenth Circuit: United States Forest Service; Michael Johanns, Secretary of Agriculture; Dale Bosworth, Chief of the Forest Service; Rick Cables, Regional Forester for Region II; and Bill Bass, Forest Supervisor for the Bighorn National Forest.

Medicine Wheel Coalition on Sacred Sites of North America was a Defendant-Intervenor in the District Court and Appellee-Intervenor before the Tenth Circuit.

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Wyoming Sawmills, Inc., seeks review of the opinion of the United States Court of Appeals for the Tenth Circuit. *Wyoming Sawmills, Inc. v. United States Forest Service*, 383 F.3d 1241 (10th Cir. 2004). Appendix ("App.") 1. The Tenth Circuit's Order denying Wyoming Sawmills' Petition for Rehearing *En Banc* is reproduced at App. 69. The opinion of the United States District Court for the District of Wyoming is reproduced at App. 24. *Wyoming Sawmills, Inc. v. United States Forest Service*, 179 F.Supp.2d 1279 (D.Wyo. 2001).

JURISDICTION

The Supreme Court of the United States has jurisdiction to hear this case under Article III of the United States Constitution and has the power to grant *certiorari* under 28 U.S.C. § 1254. The judgment sought to be reviewed was entered on September 20, 2004, by the United States Court of Appeals for the Tenth Circuit. Wyoming Sawmills' Petition for Rehearing *En Banc* was denied on December 3, 2004.

CONSTITUTIONAL PROVISION INVOLVED

The Establishment Clause of the First Amendment to the United States Constitution provides that "Congress shall make no law respecting an establishment of religion. . . ." U.S. Const. amend. I.

STATEMENT OF THE CASE

On February 17, 1999, Wyoming Sawmills filed its complaint in the United States District Court for the District of Wyoming alleging, *inter alia*, that the decision of the United States Forest Service ("Forest Service") to manage almost 50,000 acres of the Bighorn National Forest as a "sacred site" by means of its Historic Preservation Plan for the Medicine Wheel National Historic Landmark and Vicinity (hereinafter "HPP") violated the Establishment Clause of the First Amendment.

On December 6, 2001, the District Court ruled that "the HPP caused [Wyoming] Sawmills to lose the opportunity to bid[;]" therefore, Wyoming Sawmills "has suffered an injury in fact. . . ." *Wyoming Sawmills*, 179 F.Supp.2d at 1293. App. 40-41. The District Court then ruled, however, that Wyoming Sawmills' injury was not redressable due to the fact that "striking down the HPP will not grant [Wyoming] Sawmills a right to log . . . because[,] even if [the District Court] struck down the HPP[,] it could not eliminate the Medicine Wheel as it is a protected National Monument." App. 42. On January 30, 2002, Wyoming Sawmills appealed the District Court's decision.

On September 20, 2004, the Tenth Circuit held that Wyoming Sawmills did not have standing because: (1) Wyoming Sawmills lacked Article III injury; and (2) Wyoming Sawmills may not bring an Establishment Clause claim because it is a corporation. *Wyoming Sawmills*, 383 F.3d 1241 (10th Cir. 2004). App. 1. On November 4, 2004, Wyoming Sawmills filed a Petition for Rehearing *En Banc*, which, on December 3, 2004, the Tenth Circuit denied. App. 69-70.

STATEMENT OF FACTS

The Bighorn National Forest, created pursuant to the Organic Act of June 4, 1897, 16 U.S.C. § 475, is located in north-central Wyoming, primarily in Big Horn and Sheridan Counties (a small portion of the Forest is in Johnson and Washake Counties), and is managed by the Forest Service. Within the Bighorn National Forest's 1.1 million acres is the Medicine Wheel National Historic Monument (hereinafter "Medicine Wheel"), which covers an area of scarcely five acres atop Medicine Mountain, which covers an area of more than 19,000 acres. App. 71. The Bighorn National Forest is managed pursuant to the Bighorn Land and Resource Management Plan (hereinafter "Forest Plan"), which sets specific goals and objectives, including providing "timber sale offerings that satisfy requirements for the local community's economic stability." Appellant's Appendix, Tenth Circuit (hereinafter "10th Cir. App.") 638-642. The harvesting of timber is a legitimate and recognized use of the National Forests; in fact, providing for a renewable supply of timber was one of two purposes cited for the establishment of national forests in the Organic Act of June 4, 1897.

Wyoming Sawmills, a commercial timber mill and the largest non-public employer in Sheridan County with 100 direct employees and 100 independent contractors, has been the primary purchaser and harvester of timber from the Bighorn National Forest for more than 40 years. 10th Cir. App. 467. It has submitted comments on all timber-related planning documents for the Bighorn National Forest, including the HPP. 10th Cir. App. 468.

On June 21, 1993, the Forest Service entered into a Memorandum of Agreement ("MOA") with the Advisory

Council on Historic Preservation, the Wyoming State Historic Preservation Office, the Medicine Wheel Alliance ("Alliance"), the Medicine Wheel Coalition On Sacred Sites of North America ("Coalition"), and Big Horn County Commissioners, (collectively, "Consulting Parties") and established, as the first "management priority" for the Medicine Wheel and Medicine Mountain, the "continued traditional cultural use" of the area as a "sacred place and important ceremonial site." *Id.* 10th Cir. App. 91. The MOA also formed the Consulting Parties into a permanent committee created to determine how Medicine Mountain should be managed. 10th Cir. App. 91-92. Neither Wyoming Sawmills nor any other representative of commercial interests was allowed to participate as a Consulting Party in the development of what would become the HPP. *Id.* In the MOA, the Forest Service also agreed to close part of Forest Development Road ("FDR") 12, which provides access to the Medicine Wheel, although an exemption was granted for the "special needs of traditional religious practitioners." 10th Cir. App. 92.

On August 29, 1994, the Forest Service published a Programmatic Agreement with the Consulting Parties, 10th Cir. App. 72-84, for the development of a plan for the "long-term management of the Medicine Wheel and Medicine Mountain." 10th Cir. App. 72. As part of the Agreement, the Forest Service prohibited any "undertakings in an area within a radius of 2.5 miles [approximately 12,566 acres] around the Medicine Wheel, including any new mining, oil and gas development, timber harvesting, and construction activities, until completion and adoption of the HPP." 10th Cir. App. 79.

In April 1996, the Forest Service published a draft HPP, 10th Cir. App. 235, in which it affirmed "the importance of the Medicine Wheel as a American Indian Shrine" and responded to "a resurgence of Native American spiritualism and new information that *all of Medicine Mountain* was of religious importance to American Indians, *not simply the Medicine Wheel*." 10th Cir. App. 238 (emphasis added). Thus, the Forest Service proposed to close a 718-acre "core" area around the Medicine Wheel to all commercial uses, including "timber management." 10th Cir. App. 252. The Forest Service also proposed to prohibit all activity within a "peripheral area" comprising 19,525 acres of Medicine Mountain, if that activity "might detract from the values of the Medicine Wheel and associated features." *Id.*

In September 1996, the Forest Service published the final HPP, 10th Cir. App. 256-436, which created a 19,500-acre "Area of Consultation," "roughly [the] equivalent to the Medicine Mountain viewshed" that "defines the boundaries in which the [Forest Service] will consult with the [Consulting Parties]. . . ." 10th Cir. App. 305, 347. The HPP barred all activities within the Area of Consultation that might "detract from the spiritual and traditional values" associated with "Medicine Mountain and the surrounding area." 10th Cir. App. 304. *See*, Map, 10th Cir. App. 306. The Forest Service emphasized that protecting the spiritual integrity of Medicine Mountain is the Forest Service's "management priority." 10th Cir. App. 273.

Prior to the adoption of the HPP, almost 15,840 acres of the Area of Consultation were designated for livestock grazing and/or timber management, of which 6,000-7,000 acres were designated as available for timber harvesting, 10th Cir. App. 631. Moreover, the Forest Service regarded

the timber within the Area of Consultation as especially valuable because the trees therein are primarily "large and very large." *Id.* Additionally, as a result of a pest infestation that has plagued the area since 1990, 1,135 acres within the Area of Consultation had "a large amount of dead standing trees," 10th Cir. App. 348, and thus was selected for thinning to increase the "desired state of forest health" and to reduce "potential wildfire risk." *Id.* Nonetheless, the HPP prohibited any timber hauling along FDR 12, the only road by which timber may be removed from the Area of Consultation and from an additional 30,000 of acres of the Bighorn National Forest just beyond the Area of Consultation. 10th Cir. App. 349.

On October 7, 1996, the Forest Service published Amendment 12, which immediately implemented the HPP. 10th Cir. App. 573-635. Under the HPP, all of Medicine Mountain is to be managed "as a sacred site," 10th Cir. App. 221, in response to demands of American Indians who assert that all these federal lands are sacred. 10th Cir. App. 266.

On August 13, 1997, the Acting Medicine Wheel District Ranger and the Acting Forest Supervisor reviewed the Horse Creek Timber Sale Environmental Assessment ("EA") and Finding of No Significant Impact, issued in 1988, and confirmed that there were "no significant changes in actions, circumstances, or information since the EA was prepared" and that "no new issues [] had come up since the decision was made" to conduct the timber sale. 10th Cir. App. 505-506. Based on the Forest Supervisor's findings, on September 19, 1997, the Forest Service advertised the Horse Creek Timber Sale for competitive bidding. 10th Cir. App. 513-533. The Consulting Parties immediately objected to the sale because, although the site

of the sale is several miles north of and outside the Area of Consultation, the sale would require timber hauling on FDR 11, a small part of which is within the far eastern boundary of the Area of Consultation. 10th Cir. App. 533, 536-572. In response to those objections, on September 30, 1997, the Forest Service withdrew the Timber Sale, citing an alleged "procedural error on the part of the Forest Service to enter into formal consultation with the [Consulting Parties]." 10th Cir. App. 535. The Forest Service noted that:

> We plan on re-advertising this sale after consultation takes place and any potential mitigating measures if necessary are incorporated into the timber sale contract. We anticipate that re-advertisement may occur in early 1998.

Id. The Forest Service has never, however, reoffered the Horse Creek Timber Sale.

REASONS FOR GRANTING THE WRIT

I. THE TENTH CIRCUIT'S DECISION THAT WYOMING SAWMILLS LACKS STANDING TO RAISE AN ESTABLISHMENT CLAUSE CLAIM CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER CIRCUITS.

In its decision the Tenth Circuit held that Wyoming Sawmills had not suffered an injury. App. 12. Because Wyoming Sawmills has suffered two distinct injuries in fact, specifically its lost opportunity to bid for timber contracts within the Bighorn National Forest and its direct contact with the management of Medicine Mountain and the surrounding area as a "sacred site," the Tenth

Circuit's decision conflicts with the holdings of this Court and other Circuits.[1]

A. This Court And At Least One Circuit Have Held That The Loss Of An Opportunity To Bid Is An Injury.

This Court has held repeatedly that a wrongful denial of the opportunity to bid for valuable rights constitutes an injury in fact. *See, e.g., Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 211 (1995) (wrongful denial of opportunity to bid competitively for federal highway construction contracts constitutes "an invasion of a legally protected interest"); *Northeastern Florida Chapter of the Assoc. General Contractors of America v. City of Jacksonville*, 508 U.S. 656 (1993) ("injury in fact" required for standing is inability to compete in bidding process); *Bryant v. Yellen*, 447 U.S. 352, 367-68 (1980) (plaintiffs had standing because they sought to bid for property that "might become available" if a federal law took effect). Moreover, in *Watt v. Energy Action Educational Foundation*, 454 U.S. 151 (1981), this Court held that the loss of an opportunity to bid for the exploration and development of mineral resources constitutes an injury. The Tenth Circuit's decision conflicts with the decision of this Court.

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[1] The Tenth Circuit ended its analysis immediately after determining that Wyoming Sawmills had not suffered an injury. Had it considered the other *Lujan* factors, causation and redressibility, it would have ruled in favor of Wyoming Sawmills because Wyoming Sawmills' injuries were a direct result of the Forest Service's HPP and there is a "substantial likelihood" that these injuries would be redressed if the Tenth Circuit struck down the HPP. *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992).

The Tenth Circuit's decision also conflicts with the Eighth Circuit's ruling in *Arkla Exploration Co. v. Texas Oil & Gas Corp.*, 734 F.2d 347, 353 (8th Cir. 1984). The Eighth Circuit held that an oil and gas company had standing to challenge a determination by the Department of Interior that the agency could lease, without competitive bidding, certain lands for oil or gas exploration. *Id.* at 354. It found that the Secretary's actions resulted in the loss of the opportunity to bid, which constitutes an injury. *Id.*

Wyoming Sawmills, which for more than 40 years has bid on, purchased, and harvested timber from the Bighorn National Forest and participated in the administrative process leading to those sales, was denied the opportunity to bid on timber sales because of the Forest Service's decision to manage 50,000 acres as sacred to American Indians. Specifically, Wyoming Sawmills was denied the opportunity to bid on the Horse Creek Timber Sale because it was withdrawn in response to the objections of American Indians. Under holdings of this Court and the Eighth Circuit, Wyoming Sawmills suffered an Article III injury. Nonetheless, the Tenth Circuit ruled that Wyoming Sawmills had not suffered such an injury. This Court should grant this Petition to resolve this conflict.

B. This Court And Five Circuit Courts Of Appeal Have Held That Persons Have Standing To Object When Governments Endorse Religious Symbols In Public Places.

This Court and five Circuit Courts of Appeal have held that Establishment Clause plaintiffs have standing when they come into direct contact with government endorsement of religious symbols in public places. In *County of*

Allegheny v. ACLU, 492 U.S. 573 (1989), this Court held that local residents who objected to the display of a crèche on city and county property had standing because the crèche conveyed a clearly religious message to local residents. *Id.* at 598-99, 601, 620.

The Fourth, Sixth, Tenth, Eleventh, and District of Columbia Circuits have recognized Establishment Clause standing based solely on allegations of direct personal contact with the offensive government embrace of a religious symbol in a public place. *Suhre v. Haywood County,* 131 F.3d 1083, 1086 (4th Cir. 1997) (injury to bring Establishment Clause claim is "unwelcome direct contact with a religion that appears to be endorsed by the state"); *Hawley v. City of Cleveland*, 773 F.2d 736 (6th Cir. 1985) (individual's visit to city airport conveyed standing to challenge city's lease of airport space for use as chapel); *Saladin v. City of Milledgeville*, 812 F.2d 687 (11th Cir. 1987) (recognizing standing because challengers of government's action were confronted directly by presence of word "Christianity" on city seal); *ACLU of Georgia v. Rabun County Chamber of Commerce*, 698 F.2d 1098 (11th Cir. 1983) (recognizing standing to bring Establishment Clause claim based on the individuals' state residency and their use of a state park); *Allen v. Hickel*, 424 F.2d 944 (D.C. Cir. 1970) (residents' allegation that local public park was being devoted to religious use was sufficient to confer standing); *Foremaster v. City of St. George*, 882 F.2d 1485, 1490-91 (10th Cir. 1989) (individual had standing to challenge the official logo of the City of St. George, Utah, which had picture of Mormon Temple because he had "direct, personal contact" with it); *Anderson v. Salt Lake City Corp.*, 475 F.2d 29, 31 (10th Cir. 1973) (individuals had standing to challenge existence of granite monument

of Ten Commandments in city courthouse because they were city residents).[2]

Wyoming Sawmills, as a longtime harvester of timber from the Bighorn National Forest and thus a frequent visitor to and user of that Forest and as a resident of Sheridan County, within which much of the 50,000 acres managed as "sacred" lies, came into direct contact with the Forest Service's endorsement of the 50,000 acres as a religious symbol to American Indians. Under the holdings of this Court and five Circuit Courts, Wyoming Sawmills has suffered an Article III injury sufficient to bring an Establishment Clause claim. Nonetheless, the Tenth Circuit ruled that Wyoming Sawmills had not suffered such an injury. This Court should grant this Petition to resolve this conflict.

II. THE TENTH CIRCUIT'S DECISION THAT A CORPORATION MAY NOT BRING AN ESTABLISHMENT CLAUSE CLAIM CONFLICTS WITH DECISIONS OF THIS COURT AND THE CIRCUIT COURTS.

The Tenth Circuit held that Wyoming Sawmills, "*as an artificial person*, [] has not shown how it experienced the kind of constitutional injury found in such cases."

[2] The Forest Service may argue that none of these decisions apply to Wyoming Sawmills because they involve governmental displays of sectarian religious symbols on government property. The Forest Service did not "display" Medicine Mountain and the surrounding 30,000 acres; they comprise, of course, naturally occurring geological and vegetative features. However, like the governments in the cases cited by Wyoming Sawmills, the Forest Service is endorsing the religious significance of those features to American Indians – that is, that they are sacred – and thereby are violating the Establishment Clause.

Wyoming Sawmills, 383 F.3d at 1247; App. 12 (emphasis added). The Tenth Circuit did not cite any holding of this Court or any other Circuit for its ruling. Instead, it appears to have relied on the argument propounded by the Forest Service. *Id.* at 1247; App. 12. The Forest Service argued, without reference to any controlling legal authority, that Wyoming Sawmills lacks standing as a corporation to enforce the commands of the Constitution that federal land not be managed in accordance with the religious views of particular citizens, including the view of some American Indians that Medicine Mountain is "sacred." Appellees' Brief at 25. Although the Tenth Circuit noted that it did not need to address the Forest Service's argument, App. 1, the Tenth Circuit's express holding that Wyoming Sawmills, "as an artificial person," lacks standing can have no other meaning than that a corporation lacks standing to maintain an Establishment Clause claim. *Wyoming Sawmills*, 383 F.3d at 1247; App. 12. The Tenth Circuit's holding conflicts with the decisions of this Court and the other Circuit Courts.

A. This Court Has Held Consistently That Corporations May Maintain First Amendment Challenges.

It is beyond cavil that corporations may bring First Amendment challenges, including challenges regarding violations of the Establishment Clause. *See, e.g., Two Guys From Harrison-Allentown Inc. v. McGinley*, 366 U.S. 582 (1961) (corporation had standing to challenge whether law was one respecting establishment of religion); *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978) (when a general political issue materially affects a corporation's business property or assets, a corporation may

claim First Amendment protection); *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 89 (1989) (publisher has standing to challenge Establishment Clause violation when required to pay state taxes that religious publishers were excluded from paying); *National Ass'n for the Advancement of Colored People v. Button*, 371 U.S. 415 (1963) (corporation has standing to bring First Amendment claim regarding freedom of expression and freedom of association).

B. The Circuit Courts Have Held Consistently That Corporations May Maintain First Amendment Challenges.

The Circuit Courts are of one accord on the ability of corporations to bring First Amendment challenges, including challenges regarding violations of the Establishment Clause. *Hang On, Inc. v. City of Arlington*, 65 F.3d 1248, 1252 (5th Cir. 1995) (corporation has standing to assert First Amendments rights of its employees where violation of those rights adversely affects financial interests or patronage of business); *California Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088 (9th Cir. 2003) (corporation has standing to assert First Amendment challenge to state statute regulating ballot-measure advocacy inasmuch as corporation previously had advocated for defeat or passage of ballot measures); *Vermont Right to Life Committee, Inc. v. Sorrell*, 221 F.3d 376 (2nd Cir. 2000) (corporation has standing to challenge state statutes that violate First Amendment). In fact, with its decision in *Wyoming Sawmills*, the Tenth Circuit stands alone in ruling that a corporation may not bring an Establishment Clause challenge.

Wyoming Sawmills, as a frequent visitor to and user of the Bighorn National Forest and as a resident of

Sheridan County, Wyoming, has come into direct contact with the Forest Service's management of 50,000 acres of the Bighorn National Forest as sacred to American Indians and this contact has materially affected its property, assets, and financial interests. Under the holdings of this Court and the Circuit Courts, Wyoming Sawmills has standing to bring an Establishment Clause. Nonetheless, the Tenth Circuit ruled otherwise. This Court should grant this Petition to resolve this conflict.

III. THE FOREST SERVICE'S ACTIONS VIOLATE THE ESTABLISHMENT CLAUSE.

In *Lemon v. Kurtzman*, 403 U.S. 602 (1971), this Court held that government action does not offend the Establishment Clause, but only if it: (1) has a secular purpose; (2) does not have the principal or primary effect of advancing or inhibiting religion; and (3) does not foster an excessive entanglement with religion. *Id.* at 612-613. The Forest Service's actions violate all three prongs of this test.

A. The Forest Service's Actions Lack A Secular Purpose.

The primary purpose of the Forest Service's actions in it management of Medicine Mountain is to advance religion. The Forest Service admits that its primary purpose is to manage the Bighorn National Forest "in a way that will not detract from the spiritual and traditional values associated with [Medicine Mountain]." HPP, 10th Cir. App. 304. For example, in each of the nine major sections of the HPP, the Forest Service confirms that "[t]he purpose of the HPP is to . . . protect[] the integrity of [Medicine

Mountain] *as a sacred site. . . .*" *See, e.g.*, 10th Cir. App. 221 (emphasis added). Thus, it implicitly concedes that its actions have no "secular purpose" but are designed "to favor the adherents of [American Indian religion]," *Gillette v. U.S.*, 401 U.S. 437, 450 (1971), in direct violation of the Establishment Clause. *Lemon*, 403 U.S. at 612.

In fact, the Forest Service's actions have the "purpose or effect of 'endorsing' religion," *County of Allegheny*, 492 U.S. at 592, because they create a "symbolic union" between religion and government. *Agostini v. Felton*, 521 U.S. 203, 204 (1997). The Forest Service has created a "symbolic union" between itself and American Indian religious leaders, *id.* at 204, in the form of a permanent agreement among the Forest Service, the Alliance, and the Coalition to prohibit any and all activities on or near Medicine Mountain that are inconsistent with the area's management as a "sacred site." One of the activities that those parties agreed was inconsistent with management of the area "as a sacred site" was any timber harvesting that American Indians religious leaders found objectionable. 10th Cir. App. 573-635. The Forest Service and the Consulting Parties agreed to prohibit those activities by closing the Area of Consultation to all timber hauling. *Id.* This prohibition sends a clear message to Wyoming Sawmills that it is an "outsider[], not a full member[] of the political community," and an accompanying message to adherents of American Indian religion that they are "insiders, favored members of the political community." *Lynch v. Donnelly*, 465 U.S. 688 (1984).

B. The Forest Service's Actions Have The Primary Effect Of Advancing Religion.

The Forest Service admits that the "principal or primary effect" of its actions is to prohibit any and all use of Medicine Mountain – including the 19,500 acres of the Area of Consultation and 30,000 additional acres that are accessible only by using roads that run through the Area of Consultation – that might interfere with management of those 50,000 areas as a "sacred site." HPP, 10th Cir. App. 302, 304. The Forest Service's actions "advance [] religion in [their] principal or primary effect," contrary to the Establishment Clause. *County of Allegheny*, 492 U.S. at 574. For example, by prohibiting all timber hauling within the Area of Consultation, 10th Cir. App. 318-319, 349-350, the Forest Service has barred timber harvesting on approximately 50,000 acres of the Bighorn National Forest. HPP, 10th Cir. App. 345, 351. The Forest Service also withdrew an official request for competitive bids on the Horse Creek Timber Sale in direct response to the demands of American Indians and, because of the continuing objections of American Indians, refuses to reoffer the Sale. HPP, 10th Cir. App. 533-535.

The Forest Service also refuses to admit, although it is true, that another "principal or primary effect" of its actions has been to assign authority for managing the Bighorn National Forest to two religious organizations, the Coalition and the Alliance. These religious groups have the authority to determine whether any proposed public activities in the Medicine Wheel/Medicine Mountain area are consistent with management of the area as a "sacred site." HPP, 10th Cir. App. 294-301. This Court held that "[t]he Framers did not set up a system of government in which important, discretionary governmental powers

would be delegated to or shared with religious institutions." *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982). Nevertheless, the Alliance and the Coalition now determine whether a proposed public use of Medicine Mountain is acceptable solely on the basis of its impacts on American Indian religious practitioners. The power of the Alliance and the Coalition to determine how Medicine Mountain and the surrounding area is managed is the direct result of the Forest Service's HPP and serves solely to promote and advance American Indian religion, in violation of the Establishment Clause. *County of Allegheny*, 492 U.S. at 574.

C. The Forest Service's Actions Foster Excessive Entanglement With Religion.

The "character and purposes" of the institutions that are benefited by the Forest Service's actions are "predominantly religious." *Agostini*, 521 U.S. at 232. Those benefited institutions are American Indian religious practitioners who regard Medicine Mountain as "sacred," as well as the Alliance and Coalition, groups that were organized to promote American Indians religious activities on Medicine Mountain. Obviously, the "character and purpose" of these groups is "predominantly religious." *Id.*

The "nature of the aid" provided by the Forest Service is neither "neutral [nor] nonideological," *Agostini*, 521 U.S. at 232, because it prohibits any and all public use of Medicine Mountain that is inconsistent with its designation as a "sacred site." The Forest Service has formed a permanent union with the Alliance, the Coalition, and other individuals and entities that seek to promote American Indian religion on Medicine Mountain to ensure that no uses occur on Medicine Mountain that might, in the

view of these American Indians, "detract from the spiritual and traditional values associated with [Medicine Mountain.]" HPP, 10th Cir. App. 4.

Finally, the "resulting relationship between the [Forest Service] and the [American Indian] religious authorit[ies]," *Lemon*, 403 U.S. at 615, results in a "delegat[ion] [of] governmental power to religious institutions [and thus] inescapably implicates the Establishment Clause." *Larkin*, 459 U.S. at 122; *see also Abington*, 374 U.S. at 222. Likewise, the Forest Service "delegated to or shared with religious institutions," the Alliance and the Coalition, the power to determine what activities are permitted on the "sacred site" that is Medicine Mountain. *Larkin*, 459 U.S. at 120. This delegation of power amounts to a "fusion of governmental and religious functions," *id.* at 126-27, and is clearly "offensive to the spirit of the Establishment Clause." *Id.*

This Court should grant this Petition to ensure adherence by the Tenth Circuit to this Court's holding in *Lemon*.

IV. THIS CASE INVOLVES A MATTER OF EXCEPTIONAL CONSTITUTIONAL IMPORTANCE THAT REQUIRES RESOLUTION BY THIS COURT.

A. Whether Federal Land May Be Closed To The Public Because It Is Considered "Sacred" Affects A Vast Area Of The Western United States.

One-third of the land in this country, much of it in the West, is owned and managed by the federal government.[3]

[3] Federal Land Law Review Commission, *One Third of the Nation: The Federal Land Law Review Commission Report* (1970).

In many Western States the federal government is, if not the owner of a majority of the land, the largest single landowner. Moreover, in many rural counties within the Western States the federal government is the overwhelming majority landowner.

American Indians once populated virtually all of what is today the United States, and thus all of the land owned by the federal government was at one time home to American Indians. In addition, because the religion of those Indians commonly was land based, virtually any part of the federally owned land could be considered "sacred" to descendents of those Indians.

Citizens of the Western States, particularly those of rural counties, use and rely upon land owned and managed by the federal government for their recreation and economic activities. In fact, land owned by the United States provides the economic mainstay of the overwhelming majority of rural Western counties, supporting as it does such diverse activities as tourism, forestry, ranching, mining, and oil and gas exploration and development. For example, Wyoming Sawmills is the largest private employer in Sheridan County, Wyoming. *See*, http://www.wyomingsawmills.com. Without the access to lands owned by the United States that federal law permits and has permitted for more than a century, many rural Western counties, including Sheridan County, Wyoming, would be devastated.

If the actions taken by the United States here – that is, the closure of federal land to timber activity because of the beliefs of some American Indians – are upheld, the consequences to Westerners, particularly rural Westerners, will be significant and far reaching. In fact, the federal

government has taken and is continuing to take similar actions in various locations throughout the Western States.

Because of the exceptional importance of this matter to citizens of the Western United States, in particular, citizens of rural areas of the West, this Court should grant this Petition.

B. The Decision Of The Tenth Circuit, By Allowing The Federal Government To Deny Access To Public Lands Based On Religion, Is In Direct Conflict With The Controlling Decision Of This Court.

This Court has made it clear that federal land may not be closed to the public for the purposes of religious activity. *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988). *Lyng* concerned a challenge to the Forest Service's decision to allow timber harvesting and road construction in an area of the Six Rivers National Forest that is considered sacred by several American Indian tribes. This Court upheld the Forest Service's decision, finding "[t]he First Amendment must apply to all citizens alike, and it can give to none of them a veto over public programs that do not prohibit the free exercise of religion." *Lyng*, 485 U.S. at 452. This Court held that the Constitution "does not provide a principle that could justify upholding respondents' legal claim." *Id.* at 451-52.

The *Lyng* decision made clear that demands for privacy by American Indians cannot justify the government's closure of public lands, even temporarily: "Nothing in the principle for which [the American Indians] contend, however, would distinguish this case from another lawsuit

in which they (or similarly situated religious objectors) might seek to exclude all human activity but their own from sacred areas of the public lands." *Lyng*, 485 U.S. at 452-53.

By its actions in the Bighorn National Forest, the Forest Service has acceded to demands of American Indians that it "exclude all human activity but their own from sacred areas of the public lands" that are the Bighorn National Forest. *Id.* The Tenth Circuit's ruling, by allowing the Forest Service's actions to continue, conflicts with this Court's holding in *Lyng*. This Court should grant this Petition to resolve this conflict.

CONCLUSION

For all of the above reasons, this Court must grant this Petition.

Respectfully submitted,

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Submitted March 2, 2005

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PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

WYOMING SAWMILLS INCORPORATED, a Wyoming corporation,

Plaintiff-Appellant,

v.

UNITED STATES FOREST SERVICE; and ANN M. VENEMAN, Secretary, U.S. Department of Agriculture; DALE N. BOSWORTH, Chief, U.S. Forest Service; RICK D. CABLES, Regional Forester, Region II, U.S. Forest Service; and BILL BASS, Supervisor, Bighorn National Forest, all in their official capacities,

Defendants-Appellees,

and

MEDICINE WHEEL COALITION ON SACRED SITES OF NORTH AMERICA,

Defendants-Intervenors-Appellees.

No. 02-8009.

NATIONAL CONGRESS OF AMERICAN INDIANS AND NATIONAL TRUST FOR HISTORICAL PRESERVATION; BECKET FUND FOR RELIGIOUS LIBERTY AND VARIOUS CHRISTIAN, JEWISH AND MUSLIM ORGANIZATIONS, Amici Curiae.

APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING
(D.C. No. 99-CV-0031-J)

(Filed Sep. 20, 2004)

William Davis Thode, Esq., (William Perry Pendley, Esq., with him on the briefs) Mountain States Legal Foundation, Lakewood, Colorado, for Plaintiff-Appellant.

David C. Shilton, Attorney, (Kelly A. Johnson, Acting Assistant Attorney General, Environment and Natural Resources Division, Matthew H. Mead, United States Attorney, Carol A. Statkus, Assistant United States Attorney, E. Anne Peterson, Attorney, with him on the brief) United States Department of Justice, Washington, D.C., for Defendants-Appellees.

Jack F. Trope, (Andy Baldwin, Baldwin & Crocker, P.C., Lander, Wyoming, with him on the brief) Association on American Indian Affairs, Rockville, Maryland, for Intervenor-Appellee.

Steven J. Gunn, Jerome N. Frank Legal Services Org., New Haven, Connecticut, Walter R. Echo-Hawk, Jr. and Steven C. Moore, Native American Rights Fund, Boulder, Colorado, and Paul W. Edmondson, Elizabeth S. Merritt, and Anita C. Canovas, National Trust for Historic Preservation, Washington, D.C., filed an Amicus Curiae Brief for National Congress of American Indians and National Trust for Historical Preservation in support of Appellees.

Anthony Picarello, Roman Storzer, and Derek L. Gaubatz, The Becket Fund for Religious Liberty, Washington, D.C., and Robert L. Greene, The Law Offices of Robert L.

Greene, New York, New York, filed an Amicus Curiae Brief for The Becket Fund for Religious Liberty, in support of appellees.

Before **HENRY**, **HOLLOWAY** and **MURPHY**, Circuit Judges.

HOLLOWAY, Circuit Judge.

Plaintiff-appellant Wyoming Sawmills Incorporated brings this appeal from the district court's order dismissing plaintiff's claim of violation of the Constitution's Establishment Clause and holding against plaintiff on the merits of its claims of violation of the National Forest Management Act.[1] Plaintiff commenced this action in the district court after the United States Forest Service had rejected plaintiff's challenges to the Historic Preservation Plan issued by the Forest Service for the management of the Medicine Wheel National Historic Landmark and Vicinity. Named as defendants in the complaint were the Forest Service, the Secretary of Agriculture (who is the cabinet officer with authority over the Forest Service), and three individual officers of the Service, all of whom will be referred to herein as the Forest Service or just the Service. The Medicine Wheel Coalition on Sacred Sites of North America was permitted to intervene in the district court

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[1] The district court's opinion is published at 179 F.Supp.2d 1279 (D. Wyo. 2001), and includes a more detailed description of the background of the litigation.

and is aligned with the Service as an appellee in this court.

I

The Medicine Wheel National Historic Landmark was created in 1969 to preserve the Medicine Wheel, a prehistoric stone circle about 80 feet in diameter that was constructed by the aboriginal peoples of North America. The wheel includes a large cairn in the center and 28 radiating spokes of rocks. Although the age of the structure is unknown, archeological evidence indicates that human presence in the area goes back for 7,500 years or more. Many tepee rings, trails, and other artifacts and traces of human habitation are found in the vicinity. A number of Native American tribes consider the Wheel to be sacred.

The Medicine Wheel is located on Medicine Mountain in the Bighorn National Forest in north central Wyoming. In 1957, approximately 200 acres in the Bighorn National Forest were set aside for the preservation of the Wheel, and designation as a National Historic Landmark followed twelve years later. In the 1980s, the Forest Service began to reconsider the level of protection afforded the area. An increase in the number of visitors to the monument had raised concerns of visitor safety and concern that the features and artifacts were at risk. On the other hand, apparently some officials were of the view that the flow of visitors should be facilitated.

In 1991, the process resulted in the publication of a Draft Environmental Impact Statement (DEIS) which set out management alternatives. The preferred alternative set out in the DEIS called for road construction and

improvements to allow unrestricted vehicular access except during times of ceremonial use of the Wheel, construction of an enlarged parking lot adjacent to the Wheel, and so forth. The Forest Service received more than 300 comments on the DEIS, many of which were critical and called for an approach more sensitive to the concerns of Native Americans.

In response, the Service withdrew the proposal and began a more intensive consultation process with the Wyoming State Historic preservation Officer and the federal Advisory Council on Historic Preservation.[2] The Big Horn County Commissioners, the Medicine Wheel Coalition on Sacred Sites of North America, the Medicine Wheel Alliance, and the Federal Aviation Administration[3] also became "Consulting Parties" in the development of plans for management of the site. The Consulting Parties entered into a Memorandum of Agreement (MOA) which established that "the management priorities for management for the Medicine Wheel are its protection and continued traditional cultural use consistent with Section 110(f) of the [National Historic Preservation] Act." I Aplt. App. 91.

The Consulting Parties comprised a committee for planning management of the site. Plaintiff notes that no representative of commercial interests was involved in this process. The Forest Service agreed in the MOA to close a portion of Forest Development Road (FDR) 12, which

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[2] The Service is required to consult with other federal, state, and local agencies and Indian tribes by the National Historic Preservation Act, 16 U.S.C. § 470h-2(a)(2).

[3] The FAA was involved because it has operated a radar site on the mountain since 1962.

provides access to the Medicine Wheel; an exemption to the closing was made for the "special needs of traditional religious practitioners" to reach the site. (As will be seen, the alleged impact on logging of the decision to close FDR 12 is important to plaintiff's action). The term of the MOA appears to have been quite brief; it apparently was executed in mid-1993 and provided that it was to expire on January 1, 1994.

On August 29, 1994, the Forest Service published a Programmatic Agreement with the Consulting Parties, the stated purpose of which was to develop a plan for the long term management of the Medicine Wheel and Medicine Mountain. As part of this agreement, the Service prohibited, temporarily, any new "undertakings" in an area within 2.5 miles of the Medicine Wheel, including any new mining or timber harvesting, until the anticipated Historic Preservation Plan could be completed and adopted.

In September 1996, the Service adopted the long-term plan now at issue, titled the Historic Preservation Plan for the Medicine Wheel National Historic Landmark and Medicine Mountain (the HPP). The Service implemented the HPP on October 7, 1996, by issuing Amendment 12 to the Bighorn National Forest Plan;[4] Amendment 12 included a "Decision Notice and Finding of No Significant Impact," and Environmental Assessment. III Aplt. App. 573 *et seq.*

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[4] A forest plan, or land and resource management plan, is a planning document that guides natural resource management activities in a national forest over a period of ten years or more. *See* 16 U.S.C. § 1604.

The HPP provides that the Forest Service will consult with the other parties to the HPP for any project within an "Area of Consultation" around the monument. The "Area of Consultation" is considerably larger than the National Historic Landmark, covering an estimated 18,000 to 20,000 acres. The purpose of the consultation envisioned by the HPP is to facilitate the consideration of means to minimize impacts to historic resources and traditional cultural use.

The HPP recognizes explicitly that the cultural and historic importance of the Medicine Wheel is, for many Native Americans, an element of their religious tradition. Indeed, plaintiff points to the fact that the first page of each of the nine major sections of the HPP includes this statement: "The purpose of this HPP is to ensure that the Medicine Wheel and Medicine Mountain are managed in a manner that protects the integrity of the site as a sacred site and a nationally important traditional cultural property." *E.g.*, II Aplt. App. 263.

The Forest Service points out that preservation of the Medicine Wheel is consistent with the Service's responsibilities under a number of statutes. The Environmental Assessment produced to evaluate the environmental effects of the HPP recites:

> The Forest Service is required by law to protect and preserve National Historic Landmarks and historic properties. These laws include the Antiquities Act of 1906, the Historic Sites Act of 1935, the National Historic Preservation Act of 1966, the Archaeological and Historic Resources Preservation Act of 1974, the American Indian Religious Freedom Act of 1978, the Archaeological Resources Act of 1979 (all as amended). In

> addition, Executive Order No. 13007 signed by President Clinton, May 24, 1996, orders Federal agencies to accommodate access to and ceremonial use of Indian sacred sites by Indian religious practitioners and avoid adversely affecting the physical integrity of such sacred sites.

III Aplt. App. 582.

Plaintiff Wyoming Sawmills is a commercial timber company located in Sheridan County, Wyoming. It has been the primary purchaser of timber from the Bighorn National Forest for over 30 years. In addition to challenging the HPP, plaintiff's complaint also addressed the Forest Service's decision not to hold one particular timber sale that it had proposed. The Service had, in September 1997, advertised for bidding on a timber sale in an area referred to as Horse Creek. The Service canceled the sale after receiving bids but before opening the bids, citing a "procedural error" in having failed to consult formally with the parties to the HPP. Internal documents indicated that the Service planned to re-advertise the sale and to proceed with it. However, after consulting with the other parties to the HPP and after further deliberations, the Service identified several potential problems with the proposed sale, including "process violations, conflicting data, and incomplete [National Environmental Policy Act] analysis." As a result, the Service never conducted a sale of timber from the Horse Creek area; on the other hand, the Service did not decide to permanently cancel the project.

II

The Forest Service and intervenor defendant Coalition moved to dismiss the complaint, and alternatively moved

for judgment as a matter of law. As relevant to this appeal, the district court addressed issues of standing for plaintiff's First Amendment claim and addressed on its merits plaintiff's claim of violation of the National Forest Management Act.

The district court concluded that plaintiff did not have standing to bring its First Amendment claims. We discuss below the concept of standing generally and the elements of standing that the judge found were satisfied. The judge held that plaintiff lacked standing as to the First Amendment claims because the court could not remedy the constitutional wrongs plaintiff had alleged. The judge first determined that the legal harm suffered was, essentially, the loss of the opportunity to bid on timber sales, an injury which flowed from the decision to close FDR 12, to withdraw the Horse Creek timber sale, and other restrictions put in place by the HPP. The judge concluded that this injury could not be redressed because, even if the HPP were declared constitutionally invalid, the Forest Service would still be under no obligation to sell any timber from the Area of Consultation. The judge cited *Mount Evans Co. v. Madigan,* 14 F.3d 1444 (10th Cir. 1994); *Wyoming v. Lujan,* 969 F.2d 877 (10th Cir. 1992); *Ash Creek Mining Co. v. Lujan,* 969 F.2d 868 (10th Cir. 1992); and *Baca v. King,* 92 F.3d 1031 (10th Cir. 1996).

The district judge then considered plaintiff's claim that the Forest Service had violated its own regulations and the National Forest Management Act (NFMA) in adopting the HPP by means of Amendment 12 to the Forest Management Plan. After concluding that the plaintiff had established standing to advance that claim, the judge ruled against the plaintiff on the merits. The gist of the district court's ruling on this claim is that the

procedural protections which plaintiff had invoked were not, in fact, required because Amendment 12 was not a "significant" alteration of the Forest Management Plan.[5]

III

A

We review *de novo* the district court's determination that plaintiff lacked standing to pursue its First Amendment claims. *See Hackford v. Babbitt,* 14 F.3d 1457, 1465 (10th Cir. 1994).

> [T]he irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an "injury in fact" – an invasion of a legally protected interest which is (a) concrete and particularized, and (b) "actual or imminent, not 'conjectural' or 'hypothetical.'" Second, there must be a causal connection between the injury and the conduct complained of – .... Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."

Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992) (internal citations omitted). The burden is on the plaintiff, as the party asserting jurisdiction, to establish these elements. *Id.* at 561. Further, "each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.,* with the

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[5] The district court also held that the plaintiff lacked standing to bring the claim alleged in the complaint under the National Environmental Policy Act, and ruled against plaintiff on the merits of its claim under the Federal Advisory Committee Act. Plaintiff has not appealed these holdings of the district court.

manner and degree of evidence required at the successive stages of the litigation." *Id.*

The district court held that plaintiff had met its burden at the pleading stage of showing an injury in fact because plaintiff had pleaded that it had lost the right to bid on timber contracts as a result of the adoption of the HPP. The complaint also alleges that this deprivation of opportunity was a constitutional injury because it was based on the Service's decision to manage Medicine Mountain as a sacred site in violation of the First Amendment's Establishment Clause. Plaintiff asserts on appeal that the district court was correct in this determination but that the court erred in rejecting plaintiff's argument that it also was injured because it was "directly affected" by the management of Medicine Mountain as a sacred site.[6] We address this latter point first.

B

Plaintiff contends that it has standing to complain of the alleged violation of the Establishment Clause – independent of the alleged loss of opportunity to bid on timber sales, which is discussed *infra* – because it is "directly affected" by the Service's adoption of the HPP, representing the decision to manage Medicine Mountain as a sacred site. Plaintiff relies on *Abington School Dist. v. Schempp,* 374 U.S. 203, 224 n.9 (1963), and its progeny, including two cases from this court, *Robinson v. City of Edmond,* 68

[6] In the district court plaintiff also claimed other injuries, but its appellate contentions are limited to the two alleged injuries stated in the text.

F.3d 1226 (10th Cir. 1995), and *Foremaster v. City of St. George,* 882 F.2d 1485, 1489 (10th Cir. 1989).

The Forest Service, in its brief, expresses doubt as to whether a for-profit corporation can sustain a non-economic injury under the Establishment Clause. Whatever the answer to that question may be, we conclude that this plaintiff has not alleged such an injury. In its attempt to explain how it has been directly affected, plaintiff repeatedly refers to the alleged restrictions on timber cutting which it says will follow from the HPP. Plaintiff asserts that it is directly affected "by the loss of the right to have federal land classified consistently with the Establishment Clause and the loss of the opportunity to bid for timber contracts." Plaintiff-Appellant's Opening Brief at 20. Similarly, plaintiff says that it "directed its complaint against . . . the decision of the Forest Service to close 50,000 acres . . . to timber harvesting" as a result of the adoption of the HPP. *Id.* at 21, n.8. Elsewhere, plaintiff very similarly asserts that "the lost opportunity to bid demonstrates that Wyoming Sawmills is 'directly affected' by the HPP and therefore has standing." Plaintiff-Appellant's Reply Brief at 4.

We discern no allegation of cognizable injury separate from the alleged loss of opportunity for profitable logging. Plaintiff's invocation of such religious symbolism cases as *Foremaster* is unpersuasive. As an artificial person, plaintiff has not shown how it experienced the kind of constitutional injury that has been found in such cases. Instead, its arguments repeatedly refer to and rely on the alleged economic injury. We therefore conclude that plaintiff's claim for standing must turn on the alleged economic injury of the loss of opportunity for logging, to which we now turn.

C

We consider here the question whether plaintiff has suffered an economic injury. The district judge held that the loss of the opportunity to bid on future timber sales was an injury in fact sufficient to satisfy the first prong of the standing analysis and that the injury was caused by the defendant's conduct. On appeal, the Forest Service argues, as an alternative ground for affirming the judgment below, that plaintiff has not pleaded an injury in fact. We have previously observed that "each of the three standing elements blends into the others," *Ash Creek Mining Co. v. Lujan,* 969 F.2d 868, 875 (10th Cir. 1992), and we think that the district judge cannot be faulted for his holding that the plaintiff's attempt to establish standing faltered at the third requirement rather than the first. In previous cases we have applied the standing analysis in this manner, and the district judge faithfully applied our precedents.

In *Ash Creek* the plaintiff was a coal mining company which desired to bid for leases in an area under federal control. The Secretary of the Interior had decided to remove the tract from competitive coal leasing so that the tract could be used in a property exchange. The plaintiff's attempt to prevent the exchange had previously been rejected on the basis that there was no final agency action. The exchange was effected and the plaintiff again brought a legal challenge. We held that the loss of the possibility of obtaining a federal lease for coal mining was an "injury not redressable by a favorable decision" and so did not give the plaintiff standing to object to the exchange of lands. 969 F.2d at 874. Indeed, we considered the issue so clear cut that we noted "detailed discussion" was not necessary.

Id. See also Wyoming v. Lujan, 969 F.2d 877, 880-82 (10th Cir. 1992).

In *Mount Evans Co. v. Madigan,* 14 F.3d 1444, 1451 (10th Cir. 1994), we similarly held that plaintiffs who merely hoped to obtain a contractual benefit, but who had no entitlement to the benefit, lacked standing "because their injuries are not redressable by a favorable decision." Plaintiffs in that case had previously held the right to operate the Crest House on top of Mount Evans, a facility that provided food and souvenir sales, among other services. The Crest House had been destroyed by fire, and the Forest Service had decided not to rebuild on the summit. Plaintiffs filed suit to challenge that decision. They argued that a decision in their favor would require the Service to rebuild, which would give them the opportunity to compete for the concession contract. Citing *Ash Creek,* we rejected this argument, noting that even if a new facility were to be built as plaintiffs desired, there was "no guarantee" that plaintiffs would be the successful bidder for the concession contract and that no court could order the Service to award them the contract. *Id.*

We cited *Ash Creek* and *Mount Evans* with approval in *Baca v. King,* 92 F.3d 1031, 1036-37 (10th Cir. 1996), in which we held that the plaintiff's alleged injuries were not redressable because the only two actions that would remedy the alleged wrongs were an order for the government to sell the disputed land to the plaintiff or an order compelling the government to renew the plaintiff's grazing permit, neither of which were within the power of the courts to impose because either action was completely within the discretion of the Secretary of the Interior.

Plaintiff's arguments on this issue are not persuasive. Plaintiff contends that the wrongful denial of the opportunity to bid competitively for federal contracts is a sufficient basis for standing, *citing Adarand Constructors, Inc. v. Pena,* 515 U.S. 200, 211 (1995). Plaintiff misstates the holding of that case. *Adarand* involved a federal program in which contractors were given financial incentives to hire subcontractors controlled by "socially and economically disadvantaged individuals," with "race-based presumptions" included in the process for identifying such subcontractors. 515 U.S. at 204. The Court said that the "injury in cases of this kind is that a 'discriminatory classification prevent[s] the plaintiff from competing on an equal footing.'" *Id.* at 211 (*quoting Northeastern Fla. Chapter, Associated Gen. Contractors of America v. Jacksonville,* 508 U.S. 656, 667 (1993)). For this type of case, the Court said, "the aggrieved party 'need not allege that he would have obtained the benefit but for the barrier in order to establish standing.'" *Id.* (*quoting Jacksonville,* 508 U.S. at 666). Plaintiff Wyoming Sawmills has not alleged that it was treated differently from any other timber company. *Adarand* is thus inapposite.

Plaintiff asserts that *Bryant v. Yellen,* 447 U.S. 352, 366-68 (1980), stands for the proposition that standing is established if the plaintiff seeks to bid for property that "might become available." But again, we find that plaintiff has stated the holding of the case in overly general terms and that the holding does not support plaintiff's claim for standing in this matter. The facts of that case are not at all analogous to the facts before this court and are rather unusual and complicated, but it is sufficient to say that the plaintiffs in that case sought to purchase lands that the Court held would "likely" become available if the

plaintiffs prevailed. Wyoming Sawmills has not shown that a timber lease would "likely" become available on the lands within the area of consultation if plaintiff were to have the HPP set aside. As in *Baca,* the federal agency has complete discretion as to whether to offer the opportunity sought by the plaintiff, and accordingly the courts do not have the power to grant the only relief that would rectify the alleged injury.

Plaintiff similarly contends that the loss of an opportunity to bid was held sufficient to confer standing in *Watt v. Energy Action Educational Foundation,* 454 U.S. 151 (1981). Again, we disagree with plaintiff's characterization of the holding of the case. In *Watt,* the Court noted that the State of California claimed standing on two grounds – first, as an "involuntary 'partner'" with the Federal Government in oil and gas leasing, and second, as a competitor with the Federal Government in the same endeavor. The Court held that California had standing on the first basis and did not consider the second claim of standing, contrary to Wyoming Sawmills' description of the case. Wyoming Sawmills does not claim to be an "involuntary partner" with the Forest Service, and its argument is not supported by *Watt.*

Wyoming Sawmills also relies on *Arkla Exploration Company v. Texas Oil & Gas Corp.,* 734 F.2d 347 (8th Cir. 1984). Of course, we are bound by our precedents, discussed *supra,* and so would not be free to follow *Arkla* if it supported plaintiff's argument, but we also note that the case is distinguishable. The plaintiff in that case sought

the right to bid on lands which had been offered. 734 F.2d at 353-54.[7]

We therefore affirm the district court's holding that plaintiff Wyoming Sawmills does not have standing to bring its First Amendment claim.

IV

A

In its complaint, plaintiff alleged that Amendment 12 to the Bighorn Forest Plan (the mechanism by which the HPP was implemented) was a *de facto* change in the designation of lands within the Area of Consultation which were previously designated as suitable for wood fiber production (*i.e.*, logging).[8] Plaintiff alleged, and argues on appeal, that the Forest Service failed to inquire into and disclose the effects of the HPP when it solicited public comment on the HPP. Plaintiff also maintains that the Service failed to follow its own Forest Service Handbook standards for amending the Forest Plan, in violation of the Administrative Procedures Act (APA).

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[7] In its reply brief, plaintiff cites two cases which do support its argument, *Wyoming Timber Industry Ass'n v. United States Forest Service*, 80 F.Supp.2d 1245 (D. Wyo. 2000), and *Mountain States Legal Foundation v. Glickman*, 92 F.3d 1228, 1233 (D.C. Cir. 1996), but we are, of course, bound by our precedents. We note that our position is consistent with that of another circuit in a case relied on by the Forest Service, *Region 8 Forest Service Timber Purchasers Council v. Alcock*, 993 F.2d 800, 808-09 (11th Cir. 1993).

[8] Plaintiff alleged that a *de facto* change of designation was also imposed on some areas outside the Area of Consultation which were serviced by FDR 11.

The district court first found that plaintiff had standing to assert this claim. 179 F.Supp.2d at 1297-98. The judge noted that, because the NFMA does not provide for judicial review of decisions by the Forest Service, the general provisions of the APA apply. Under the APA, a person "suffering legal wrong because of agency action" may obtain judicial review. 5 U.S.C. § 701. The Forest Service did not dispute that the HPP and Amendment 12 were final agency actions, nor that timber interests are within the zone of interests protected or regulated by the NFMA. The judge then noted that the standing requirement of redressability is applied less strictly when, as with this claim, a party is seeking to enforce a "procedural right." *See id.* at 1298 (*citing and quoting Lujan v. Defenders of Wildlife,* 504 U.S. 555, 572 n.7 (1992)).

The intervenor-appellee, Medicine Wheel Coalition on Sacred Sites of North America, challenges plaintiff's standing to bring its claim under the NFMA, although the Forest Service does not contest the district court's ruling on this point. We see no error in the district court's holding on this point, however, and proceed to review the merits.

B

Our standard of review is a deferential one, and we will reverse the Forest Service's action only if it is "'arbitrary, capricious, otherwise not in accordance with the law, or not supported by substantial evidence.'" *Citizens' Committee To Save Our Canyons v. United States Forest Service,* 297 F.3d 1012, 1021 (10th Cir. 2002) (*quoting Hoyl v. Babbitt,* 129 F.3d 1377, 1382 (10th Cir. 1997)). No deference is due to the district court's decision in review of the agency's action, however. *Id.*

The National Forest Management Act (NFMA) provides that once enacted, forest plans may "be amended in any manner whatsoever." 16 U.S.C. § 1604(f)(4). As we explained in some detail two years ago, if

> an amendment to a forest plan would be "significant," however, then NFMA mandates substantial public involvement, planning, and input, requiring, in essence, the Forest Service "to conduct the same complex planning process applicable to promulgation of the original plan." *Sierra Club v. Cargill,* 11 F.3d 1545, 1551 (10th Cir. 1993) (Seymour, J., dissenting); *see* 36 C.F.R. § 219.10(f). Among other things, for significant amendments, NFMA requires the Forest Service to "mak[e] plans or revisions available to the public at convenient locations in the vicinity of the affected unit for a period of at least three months before final adoption." 16 U.S.C. § 1604(d).

Citizens' Committee, 297 F.3d at 1032-33 (footnote omitted). We have noted before that the Act does not provide guidance as to what amendments are "significant." *Cargill,* 11 F.3d at 1548.

> Indeed, applicable regulations "expressly commend[] the determination of the significance of an amendment to the Forest Supervisor's judgment." *Id.* According to the regulations, "Based on an analysis of the objectives, guidelines, and other contents of the forest plan, the *Forest Supervisor shall determine* whether a proposed amendment would result in a significant change in the plan." 36 C.F.R. § 219.10(f) (emphasis added). If the Forest Supervisor concludes that an amendment is nonsignificant, "[he] may implement the amendment following *appropriate*

> *public notification* and satisfactory completion of [National Environmental Policy Act] procedures." *Id.* (emphasis added).

Citizens Committee, 297 F.3d at 1033.

In the absence of specific direction from Congress, the Forest Service has adopted guidelines in its Forest Service Handbook (FSH) for consideration of the significance of amendments to a forest plan:

> Although the Forest Supervisor has wide discretion in deciding whether an amendment is significant, the FSH outlines factors the Supervisor must consider when assessing the significance of a proposed amendment, including 1) the timing of the proposed change relative to the expiration or next scheduled revision of the Forest Plan (the shorter the remaining life of the plan, the less significant the amendment); 2) "the location and size of the area involved in the change" in comparison to the "overall planning area"; 3) the long-term significance of the project relative to the goals and objectives of the forest plan; and 4) the impact of the amendment on "management prescription" – whether the change applies only to a specific situation or whether it likely will affect future decisions as well. FSH 1909.12 § 5.32(3)(a)-(d).

Id. (footnote omitted). In this appeal, plaintiff accepts these criteria and frames its arguments in their terms. Accordingly, our review will also focus on these factors.

Although as explained we review the agency's decision deferentially but without deference to the district court's holdings, in this instance we see no error in the district court's analysis. The first factor set out above from the

FSH is the timing of the amendment. On this point, Wyoming Sawmills does not challenge the district court's observation that the amendment came late in the planning period, after the period's first decade. Nor does Wyoming Sawmills dispute the conclusion that this factor favors a finding that the amendment was not significant.

Wyoming Sawmills does contest the agency's, and district court's, conclusion on the second factor, the size of the affected area compared to the overall planning area. The district court agreed with the agency that the size of the affected area is relatively small, observing that the Area of Consultation is only 18,000 acres or only 1.6% of the Bighorn National Forest. Plaintiff disputes this conclusion by asserting that it is improper to use the entire forest in the comparison and by contending that Amendment 12 in fact affects much more than 18,000 acres.

First, plaintiff contends that the overall planning area which should be used to determine the relative significance of the affected area should not be the entire forest but only the slightly more than 200,000 acres that are deemed "available" for timber management. But plaintiff offers neither reason nor authority to persuade us that the Service abused its discretion in using the acreage of the entire forest in its analysis. The deference owed to the Service does not permit us to find an abuse of discretion on this point.

Plaintiff emphatically contends that the decision to implement the HPP will affect an area much greater than the 18,000 acre Area of Consultation. Plaintiff bases this contention on the assertion that the decision to close FDR 12 and to bar the use of other roads passing through the Area of Consultation effectively closes an additional

30,000 acres of the forest north and west of the Area of Consultation.

The Forest Service and the intervenor Coalition offer several points in response that severely undercut the impact of plaintiff's argument. First, we note that plaintiff has not explained how it has determined that an additional 30,000 acres are affected. Second, the district court observed that plaintiff had not shown that FDR 12 had ever been used for timber hauling; plaintiff has not countered this point. Third, the Forest Service stated expressly in the HPP that it would "continue to explore opportunities for alternative access to National Forest System lands north of the Medicine Wheel," an effort which it described as the "long term goal" of its management efforts. II Aplt. App. 318. Perhaps most significantly, the Service determined that implementation of the HPP "will not result in significant changes to those levels of outputs projected under the current Bighorn National Forest Plan." III Aplt. App. 626.[9]

The HPP does not prohibit logging in the Area of Consultation. At least two roads within the consultation area are not barred to timber hauling, although the HPP does require a consultation process for approval of their use. *Id.* at 571. More generally, Amendment 12 did not change any actual management allocations (for timber or livestock grazing, for example) but added standards and guidelines to be followed in pursuit of the existing allocations. Of the 18,000 acres in the Area of Consultation, only

[9] We note that the withdrawal of the Horse Creek timber sale was not a final agency action; accordingly, that decision may not be reviewed at this time.

about ten per cent was deemed suitable for timber production. *Id.* at 347.

As we have noted, the third factor is the long-term significance of the project relative to the goals and objectives of the forest plan. Plaintiff's inability to convince us that the Forest Service abused its discretion in its determination of the size of the area involved is doubly important because its argument on the third factor rests entirely on the premise that the decision does affect a much larger area than just the Area of Consultation. Similarly, plaintiff's argument on the fourth factor is based largely on the same assertions. In view of the deference due to the Service's determination, we hold that plaintiff has failed to show that the Service abused its considerable discretion in finding that Amendment 12 was not a "significant" change to the overall forest plan.

This holding disposes of plaintiff's NFMA claim. Plaintiff's allegations of deprivation of procedural rights are all dependent on the more stringent procedural requirements applicable to significant amendments.

Conclusion

The judgment of the district court is AFFIRMED.

United States District Court,
D. Wyoming.
WYOMING SAWMILLS, INCORPORATED,
A Wyoming Corporation, Plaintiff,
v.
UNITED STATES FOREST SERVICE; Daniel Glickman,
Secretary of Agriculture; Michael P. Dombeck,
Chief of the Forest Service; Lyly Laverty,
Regional Forester for Region II; Abigail Kimbell,
Forest Supervisor for the Big Horn National Forest;
Defendants,
and
Medicine Wheel Coalition on Sacred Sites
of North America, Defendant-Intervener.
No. 99-CV-0031-J.
Dec. 6, 2001.

ORDER GRANTING THE UNITED STATES FOREST SERVICE'S AND MEDICINE WHEEL COALITION'S MOTION TO DISMISS

ALAN B. JOHNSON, District Judge.

The United States Forest Service ("NFS") and Medicine Wheel Coalition move for this Court to dismiss Wyoming Sawmills' ("Sawmills") complaint for lack of standing or alternatively on the merits.[1] The Court, having reviewed carefully the briefs of the parties, the applicable law, all matters of record, and being fully advised, PARTIALLY GRANTS the NFS's motion to dismiss for lack of standing and finds in favor of the NFS on the remaining claims.

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[1] This Court will treat NFS's and Medicine Wheel Coalition's motions as a single motion because they are substantially similar. Therefore, this order will refer only to NFS's arguments.

BACKGROUND

The Medicine Wheel National Historic Landmark, located within the Big Horn National Forest in north-central Wyoming, is a prehistoric feature consisting of a circular structure of rocks with a diameter of eighty feet, and a large cairn (or rock pile) in the center of the circle, and 28 "spokes" of rocks radiating from the center to the edge of the circle. *See* Administrative Record ("AR") at 3839. While no Native American Tribe claims to have built the Medicine Wheel or knows when it was constructed, archeological evidence indicates that people have been present in the area for at least 7,500 years, and in the vicinity of the Wheel are numerous tepee rings, trails, and other archeological features and artifacts. *See* AR at 3839, 3853. The deep traditional historical and cultural value of the Wheel and nearby Medicine Mountain to Native Americans has been documented in various studies, and the Wheel is considered a sacred site by numerous Native American Tribes. *See* AR at 3839, 3854.

In June 1957, approximately 200 acres in Big Horn National Forest was withdrawn "for the protection and preservation of the archaeological values of the Medicine Wheel and adjacent historic area" from virtually all forms of claims, including mining and mineral claims. *See* 22 C.F.R. § 4135 (1957); AR at 3853. The Medicine Wheel was designated as a National Historic Landmark in April 1969, with 110 acres included in that designation. *See* AR at 3853.

In the late 1980s, an increase in the number of visitors to the Medicine Wheel gave rise to concerns about visitor safety, as well as concerns for protecting vegetation and prehistoric features and artifacts. *See* AR at 3839,

3842. The forest service responded by beginning a process (starting in 1988) to develop a management plan to better protect the Medicine Wheel. *See* AR at 3842. This process, which has been characterized as "lengthy and often contentious," led to the development in 1991 of a Draft Environmental Impact Statement ("DEIS") setting forth various proposed management alternatives.[2] AR at 1-114, 3842. The DEIS preferred alternative involved, *inter alia,* road construction and improvements to allow unrestricted vehicular access except during ceremonial uses, construction of an expanded parking lot immediately adjacent to Medicine Wheel to accommodate twenty cars and five larger vehicles, and construction of restrooms at the parking lot. *See* 6-9, 35. When the DEIS was released, the Forest Service received more than 300 comments from the public, many of which were critical of the proposed management and called for greater sensitivity to Native Americans or to recreational and commodity uses. *See* AR at 3842.

In light of such comments, and in response to the controversy, the Forest Service withdrew the proposal contained in the DEIS and instead began a consultation process with the Wyoming State Historic Preservation Officer and the federal Advisory Council on Historic Preservation ("Advisory Council").[3] *See* AR at 3842; *see,*

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[2] An Environmental Impact Statement ("EIS") is a document prepared pursuant to the National Environmental Policy Act ("NEPA") that describes the environmental impacts of a proposed major federal action significantly affecting the quality of the human environment. *See* 42 U.S.C. § 4332(C).

[3] The Advisory Council is an independent agency comprised of the heads of various agencies, experts on historic preservation, and other persons appointed by the President.

e.g., AR at 752-55 (Forest Service remarks indicating "new approach" to managing Medicine Wheel); AR at 774-75 (remarks of the Forest Service official explaining that because of letters, "we realize we were not heading in the right direction so that's why we took the draft EIS and we just set it to the side"). The Big Horn County Commissioners, the Medicine Wheel Coalition for Sacred Sites, the Medicine Wheel Alliance, and the Federal Aviation Administration (which has operated a radar site on Medicine Mountain since 1962) also became "Consulting Parties" in the development of a plan for the short-term management of the site until a long-term plan could be agreed on. *See* AR at 3842; *See also* AR at 1424-34.

In 1994, the Consulting Parties signed the Programmatic Agreement ("PA"), which established interim management procedures and contemplated the development of a long-term plan for managing the site. *See* AR at 2024-36. The Consulting Parties signed that long-term plan, the Historic Preservation Plan for the Medicine Wheel National Historic Landmark and Medicine Mountain ("HPP"), on September 28, 1996. The purpose of the HPP is "to establish a process for integrating the preservation and traditional uses of historic properties with the multiple use mission of the Forest Service, in a manner that gives priority to the protection of the historic properties involved by continuing traditional cultural use consistent with Section 110(f) of the National Historic Preservation Act." AR at 2619. The HPP provides for, *inter alia,* consultation between the Forest Service and other parties to the HPP for any project proposed within an "area of consultation" surrounding Medicine Wheel. *See* AR at 2619-30. Such consultation enables the involvement and consideration of means of minimizing and mitigating impacts to

historic resources and traditional cultural use. *See* AR at 2619-20. The HPP also provides for an operating plan involving on-site interpreters, visitor management, and limited motorized access, as well as protection of the traditional cultural use of the site. *See* AR at 2639-46.

The consultations and agreements culminating in the adoption of the HPP were undertaken within the framework of the Forest Service's obligations under the National Historic Preservation Act ("NHPA") and the Advisory Council's NHPA regulations. The Forest Service's obligations under the NHPA include: (1) the identification, evaluation, and management of historic properties in a way that considers preservation of their historic, archeological, architectural, and cultural values; (2) the consideration of effects of a proposed action on sites included or eligible for inclusion in the National Register of Historic Places, with an opportunity for comment by the Advisory Council, and (3) consultation with other federal, state, and local agencies, and Indian tribes in carrying out historic preservation planning activities. *See* 16 U.S.C. §§ 470f, 470h-2(a)(2); AR at 2619-20. And the Advisory Council's regulations contemplate the accommodation of historic preservation concerns through consultation between the agency, the State Historic Preservation Officer, and other interested persons, including Indian tribes, from the early stages of planning. *See* 36 C.F.R. § 800.1; *see also id.* § 800.5(e)(1) (authorizing invitation of interested persons to participate as consulting parties); *id.* § 800.13 (regulation indicating that agency's Section 106 responsibilities may be met through a Programmatic Agreement).

The Forest Service's management of the Medicine Wheel through the HPP has also been guided by other laws, including the Antiquities Act of 1906, the Historic

Sites Act of 1935, the Archeological and Historic Resources Preservation Act of 1974, the American Indian Religious Freedom Act of 1978, and the Archeological Resources Protection Act of 1979. *See* AR at 3843. These statutes, *inter alia,* authorize the setting aside of protection of historic landmarks and structures, *see, e.g.,* 16 U.S.C. §§ 431-433m (Antiquities Act); 16 U.S.C. §§ 461-467 (Historic Sites Act), require the establishment of programs to increase public awareness of the significance of archeological resources on public lands and Indian lands and the need to protect such resources, *see, e.g.,* 16 U.S.C. § 470ii(c) (provision of Archeological Resources Protection Act), and make explicit the policy of the United States to protect the freedom of the Native Americans to exercise traditional religions through "access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites," 42 U.S.C. § 1996 (American Indian Religious Freedom Act). In addition, Executive Order 13,007 requires that federal agencies accommodate access to and ceremonial use of Indian sacred sites by Indian religious practitioners and avoid adversely affecting the physical integrity of such sites. *See* 61 C.F.R. 26,771-72 (1996).

Wyoming Sawmills' ("Sawmills") complaint focuses on the HPP and the Forest Service's documentation relating to its adoption, including the Environmental Assessment (AR at 2837-89) and the Decision Notice and Finding of No Significant Impact (AR at 3834-36),[4] through which the

[4] An environmental assessment ("EA") is a document prepared pursuant to NEPA that briefly provides evidence and analysis for determining whether a proposed action will have a significant effect on the human environment. *See* 40 C.F.R. § 1508.9. A decision notice and finding of no significant impact is a document that incorporates an EA

(Continued on following page)

Forest Service approved the HPP and amended (Amendment 12) the existing forest plan.[5] *See* AR at 3834-36. The Complaint also challenges the Forest Service's October 1, 1997 decision to withdraw the Horse Creek timber sale, alleging that the decision effectively "[c]los[ed] Forest Development Road 11 for timber hauling." Complaint at 21. The Horse Creek timber sale, which was proposed to occur within the area of consultation, was advertised for bidding on September 19, 1997, with bids to be opened on October 20, 1997. *See* AR at 3773-74. The Forest Service canceled the sale before bids were opened because of a "procedural error on the part of the Forest Service to enter into formal consultation with the parties" to the HPP. AR at 3795-96. At the time of the cancellation, however, the Forest Service also indicated that it "plan[ned] on re-advertising this sale after consultation takes place and any potential mitigating measures if necessary are incorporated into the timber sale contract." *Id. see also* AR at 3826 (internal memorandum indicating need to avoid potential misperception by Native American groups that Horse Creek sale had been dropped permanently).

As consultation on Horse Creek got underway, the Forest Service reviewed the project records for the Horse Creek Sale and concluded that it "would have a hard time" defending a decision to go forward with the timber sale project because of "process violations, conflicting data, and

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and explains why an action will not have a significant impact. *See* 40 C.F.R. § 1508.13.

[5] A forest plan also known as a "Land Resource Management Plan," is a planning document that guides natural resource management activities on a National Forest over a ten- to fifteen-year period. *See* 16 U.S.C. § 1604.

incomplete NEPA analysis." AR at 3831; *see also* AR at 3828-31. Many of these deficiencies stemmed from the fact that the initial NEPA analysis for the sale, and environmental assessment, decision notice, and finding of no significant impact, was prepared in 1988, and supplemental analysis was deemed insufficient to satisfy current legal standards. *See id.* No decision, however, was made to permanently cancel the project, and no decision was made to close the Forest Road 11 to any use, including logging truck traffic. *See* AR at 3824, 3832.

STANDARD OF REVIEW

This order will employ two different standards of review because the Court is reviewing both administrative findings and deciding whether Sawmills has standing to assert its claims. With respect to the standing issues, this Court will employ the same standard of review it employs in reviewing all motions to dismiss. *See Warth v. Seldin,* 422 U.S. 490, 501, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975) ("[f]or the purposes of ruling on a motion to dismiss for want of standing, both the trial and reviewing courts must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party."); *see also State of Utah v. Babbitt,* 137 F.3d 1193, 1204 (10th Cir.1998).

Judicial review of agency action is governed by § 706 of the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706. Sawmills implicates the subsections of § 706 which require a reviewing court to hold unlawful and set aside agency action, findings, and conclusions found to be: arbitrary, capricious, an abuse of discretion, or otherwise

not in accordance with law.[6] "These standards require the reviewing court to engage in a 'substantial inquiry.' . . . An agency's decision is entitled to a presumption of regularity, 'but that presumption is not to shield [the agency's] action from a thorough, probing, in-depth review.'" *Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560, 1574 (10th Cir.1994); *quoting Citizens to Preserve Overton Park v. Volpe,* 401 U.S. 402, 415, 91 S.Ct. 814, 28 L.Ed.2d 136, (1971).

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[6] 5 U.S.C. § 706 provides:

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall –

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be –

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority or limitations, or short of statutory right;

(D) without observance or procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

Nevertheless, a court's review of an agency decision under this standard is "narrow and deferential," the court being required to uphold the agency's action if it has "articulated a rational basis for the decision and has considered relevant factors." *Mountain Side Mobile Estates Partnership v. Secretary of Housing and Urban Dev.*, 56 F.3d 1243, 1250 (10th Cir.1995). "However, these limitations do not apply to questions of law. 'The [f]ailure to apply the correct legal standard or to provide . . . a sufficient basis to determine that appropriate legal principles have been followed is grounds for reversal.'" *Id.; quoting Nielson v. Sullivan,* 992 F.2d 1118, 1119-20 (10th Cir.1993).

DISCUSSION

In this case Sawmills contends that the NFS has stepped outside of the bounds imposed by the law in four ways. First, Sawmills alleges that the NFS's plan wrongfully promotes religion in violation of the establishment clause because promoting the Indian religion was a motivating factor behind NFS's decision to enact the HPP. Second, Sawmills argues that the NFS violated its own policies and procedures under the National Forest Management Act ("NFMA") because the HPP significantly changed the forest plan and the changes were not properly subjected to public notice and comment. Third, Sawmills argues the NFS violated the Federal Advisory Committee Act ("FACA") by not allowing the public to participate in discussions regarding the Big Horn forest plan. Forth [sic], Sawmills argues that the HPP goes against the National Environmental Policy Act (NEPA) because the forest service failed to properly follow environmental procedures in enacting the HPP and HPP's *de facto* effect on logging

created a greater risk of forest fires.[7] This order will deal with the standing issues associated with each of these claims in turn and then deal with merits on those claims that the Court determines it has jurisdiction to consider.

I. *THE TENTH CIRCUIT LAW ON STANDING*

Standing "'involves both constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise.'" *Warth,* 422 U.S. at 498, 95 S.Ct. 2197. The notion of standing is grounded in Article III of the U.S. Constitution, which restricts federal court adjudication to actual cases or controversies. *See Allen v. Wright,* 468 U.S. 737, 750, 104 S.Ct. 3315, 82 L.Ed.2d 556 (1984). The doctrinal foundation of Article III standing is the principle of separation of powers. *See id.* at 750-52, 104 S.Ct. 3315.

Standing is but one of several gatekeepers "'founded in concern about the proper – and properly limited – role of the courts in a democratic society.'" *Id.* at 750, 104 S.Ct. 3315; *quoting Warth,* 422 U.S. at 498, 95 S.Ct. 2197 (1975). "All of the doctrines that cluster about Article III – not only standing but mootness, ripeness, political question, and the like – relate in part, and in different though overlapping ways, to an idea, which is more than an intuition but less than a rigorous and explicit theory, about the constitutional and prudential limits to the powers of an unelected, unrepresentative judiciary in our

[7] Sawmills' argument that the HPP increased the possibility of forest fires because it limited logging in Big Horn National Forest was not briefed or raised until oral argument. Furthermore, the issue was not raised at the administrative level. This Court only reviews the administrative court's decision. It does not decide issues that Sawmills did not raise at the administrative hearing.

kind of government." *Id. quoting Vander Jagt v. O'Neill,* 699 F.2d 1166, 1178-79 (D.C.Cir.1982) (Bork, J., concurring).

Because plaintiffs have invoked Article III jurisdiction to challenge the conduct of the executive branch of government, the necessity of a case or controversy is of particular import. *See Region 8 Forest Serv. Timber Purchasers Council v. Alcock,* 993 F.2d 800, 804 (11th Cir.1993). The warnings against unrestrained exercise of the power of judicial review over the conduct of the executive or congressional branches by relaxation of the standing requirements are numerous and dire. *See, e.g., Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.,* 454 U.S. 464, 473-74, 102 S.Ct. 752, 70 L.Ed.2d 700 (1982); *United States v. Richardson,* 418 U.S. 166, 188-93, 94 S.Ct. 2940, 2952-55, 41 L.Ed.2d 678 (1974) (Powell, J., concurring). Restraint in the exercise of judicial review preserves not only the power and vitality of the judiciary, but that of each of the other two coordinate branches of federal government as well. *See Valley Forge,* 454 U.S. at 474, 102 S.Ct. 752; *Richardson,* 418 U.S. at 188-89, 94 S.Ct. 2940. Standing to invoke the power of the federal courts is not a mere technical hoop through which every plaintiff must pass, but rather is "a part of the basic charter promulgated by the Framers of the Constitution." *Valley Forge,* 454 U.S. at 476, 102 S.Ct. 752.

Standing is not measured by the intensity of a party's commitment, fervor, or aggression in pursuit of its alleged right and remedy. *See Doremus v. Board of Educ.,* 342 U.S. 429, 434-35, 72 S.Ct. 394, 96 L.Ed. 475 (1952); *Schlesinger v. Reservists Comm. to Stop the War,* 418 U.S. 208, 225-26, 94 S.Ct. 2925, 41 L.Ed.2d 706 (1974); *Valley Forge,* 454

U.S. at 485-86, 102 S.Ct. 752; *Diamond v. Charles,* 476 U.S. 54, 62, 106 S.Ct. 1697, 90 L.Ed.2d 48 (1986). Nor is the perceived importance of the asserted right a substitute for constitutional standing. *See Valley Forge,* 454 U.S. at 484-85, 102 S.Ct. 752. The argument that no other person is better suited to bring the lawsuit is equally unavailing. *See id.* at 489, 102 S.Ct. 752 ("'[T]he assumption that if [plaintiffs] have no standing to sue, no one would have standing, is not a reason to find standing.'" *quoting Schlesinger,* 418 U.S. at 227, 94 S.Ct. 2925). "Notwithstanding its prominent gatekeeping role, the standing requirement of Article III should never be interpreted to bar a party properly before the court from invoking the power of judicial review." *State of Utah v. Babbitt,* 137 F.3d 1193, 1202 (10th Cir.1998).

To satisfy the standing requirement of Article III, plaintiffs must demonstrate the following:

> (1) that the plaintiff[s] have suffered an "injury in fact" – an invasion of a judicially cognizable interest which is
>
> (a) concrete and particularized and
>
> (b) actual or imminent, not conjectural or hypothetical;
>
> (2) that there is a causal connection between the injury and the conduct complained of – the injury must be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court; and
>
> (3) that it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

See Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992); *see also Phelps v. Hamilton,* 122 F.3d 1309, 1316 (10th Cir.1997). "The party invoking federal jurisdiction bears the burden of establishing these elements." *Defenders of Wildlife,* 504 U.S. at 561, 112 S.Ct. 2130. The burden is therefore on plaintiffs "'clearly to allege facts demonstrating that [they are] a proper party to invoke judicial resolution of the dispute.'" *United States v. Hays,* 515 U.S. 737, 743, 115 S.Ct. 2431, 132 L.Ed.2d 635 (1995) *quoting Warth,* 422 U.S. at 518, 95 S.Ct. 2197.

In addition to the immutable requirements of Article III, "the federal judiciary has also adhered to a set of prudential principles that bear on the question of standing." *Valley Forge,* 454 U.S. at 474-75, 102 S.Ct. 752. These prudential principles include "the general prohibition on a litigant's raising another person's legal rights [and] the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches." *Allen,* 468 U.S. at 751, 104 S.Ct. 3315. "[U]nlike their constitutional counterparts, [these prudential requirements] can be modified or abrogated by Congress." *Bennett v. Spear,* 520 U.S. 154, 164-65, 117 S.Ct. 1154, 137 L.Ed.2d 281 (1997).

A. *The Establishment Clause Claim*

Sawmills' first claim for relief is based on the establishment clause of the first amendment. Sawmills alleges that the HPP closed several roads that were previously open to commercial logging, caused the Forest Service to cancel its Horse Creek timber sale, and requires the Forest Service to expend tax dollars on educating tourists

about the Indian religion. Sawmills claims that these actions violate the establishment clause, and prays for this Court to strike down the HPP.

1. *Standing*

As stated above, Article III standing requires this Court to employ a three prong test. *See Defenders of Wildlife,* 504 U.S. at 560-61, 112 S.Ct. 2130. The burden of proving that it has standing is on Sawmills. First, Sawmills must demonstrate that it has suffered an *injury in fact. See id.* An injury in fact must be concrete and particularized, not abstract and general. Second, Sawmills must show that the HPP *caused* its injury. *See id.* Third, Sawmills must show that this Court could *redress* its injury by striking down the HPP. *See id.*

a. *Injury in Fact*

In support of its assertion that it has standing to raise the establishment clause issue, Sawmills alleges, in its complaint, that it has suffered five injuries as a result of the HPP:

- Closure of the Forest Development Road (FDR) 12 created a *de facto* change in the designation of federal lands to the Northeast of Medicine Wheel. Complaint ¶ 17;

- Closure of FDR 11 constitutes a *de facto* change in the designation of the 30,000 acres of Big Horn lands it serves. Complaint ¶ 21;

- Cancellation of the Horse Creek timber sale and the *de facto* closure of portions of the Big Horn National Forest to legal timber harvest were "undertaken for

> the sole purpose of furthering Native American religions." Complaint, [sic] ¶ 24. [sic]
>
> • The Programmatic Agreement, the HPP, and Forest Plan Amendment close areas of a multiple-use forest to legal timber harvesting for purposes of promoting Native American religions. Complaint, [sic] ¶ 26. [sic]
>
> • Defendants' actions violate the Establishment Clause. Complaint, [sic] ¶ 29.

Response to the Defendant's Motion to Dismiss ("Response") at 7.[8] Furthermore, Sawmills claims that it suffered three additional injuries that are unique to the establishment clause in its Response. *See* Response at 3-7. First, it claims that the HPP prevented it from freely using public areas. *Id.* at 3. Second, it claims that it has suffered an injury because it is placed in direct contact with unwelcomed religious symbolism endorsed by the United States. *Id.* at 5. Third it alleges that it suffers an injury as a taxpayer because the HPP directs funds for "interpreters" at the Medicine Wheel. *Id.* at 6.

This order deals with the injuries stated in Sawmills' complaint as one injury. In general, Sawmills alleges that it is injured because the HPP *de facto* changes the designation of the Big Horn National Forest because the closure of FDR 12 effectively eliminates the possibility of logging in the parts of Big Horn accessed by those roads. Furthermore, it claims that it suffered an injury because the NFS canceled the Horse Creek Timber sale.

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[8] Hereafter, the order will refer to these injuries as the complaint injuries.

To establish an injury in fact, Sawmills must show "a distinct and palpable injury to itself." *Glover River Org. v. United States Dep't of Interior,* 675 F.2d 251, 255 (10th Cir.1982). An abstract injury is not enough; "the injury or threat of injury must be both real and immediate, not conjectural or hypothetical." *O'Shea v. Littleton,* 414 U.S. 488, 494, 94 S.Ct. 669, 38 L.Ed.2d 674 (1974). Although "[a]n asserted right to have the Government act in accordance with the law is not sufficient, standing alone, to confer jurisdiction on a federal court," courts will generally find an injury in fact if the plaintiff can demonstrate a plausible benefit. *Allen v. Wright,* 468 U.S. 737, 754, 104 S.Ct. 3315, 82 L.Ed.2d 556 (1984); *see also Watt v. Energy Action Educ. Found.,* 454 U.S. 151, 102 S.Ct. 205, 70 L.Ed.2d 309 (1981). For example, in *Watt,* the Supreme Court held that the State of California had standing to challenge the Secretary of the Interior's failure to comply with a statute requiring it to experiment with different royalty systems in leasing offshore gas and oil production rights. *See Watt,* 454 U.S. at 160-62, 102 S.Ct. 205. Although a judgment would require the Secretary only to perform the experiments and would not guarantee the state any royalties, the Court determined that the State's loss of an opportunity for benefit constituted an injury in fact. *See id.*

In this case, Sawmills' complaint injuries are that it lost the ability to log off road 12 because the HPP closed road 12 to logging traffic. The facts do not suggest that Sawmills had an entitlement to log anywhere in Big Horn National Forest. Even so, Sawmills could potentially have earned the right to log in Big Horns if it submitted a successful bid to the NFS. Therefore, the HPP caused Sawmills to lose the opportunity to bid, much like the

Secretary of Interior's decision in *Watt,* caused the state of California to lose the benefit of experimenting with different royalty systems. Therefore, the Court finds that Sawmills has suffered an injury in fact with respect to its complaint injuries.

Sawmills' first injury as stated in its Response is that the HPP prevented it from freely using public areas. Sawmills cites authority that provides a lax standard for injuries in the context of establishment clause violations. *See* Response at 3-4. Sawmills, however, misstates the standard. Sawmills alleges that a plaintiff has standing to bring an establishment clause claim if a regulation prevents a plaintiff from freely using public areas.[9] This proposition is correct, in part. The Tenth Circuit requires the regulation to prevent a plaintiff from freely using public areas *because the plaintiff is offended by the religious symbolism that the regulation advances. See Robinson v. City of Edmond,* 68 F.3d 1226, 1228 (10th Cir.1995) (finding standing where plaintiff lived and worked in a city displaying a religious symbol in its official seal); *Foremaster v. City of St. George,* 882 F.2d 1485, 1489 (10th Cir.1989).

In *Robinson,* City of Edmond residents brought suit against the city alleging that the City seal violated the establishment clause because it contained a cross on the left-side of the seal. *See Robinson,* 68 F.3d at 1228. The Tenth Circuit found that plaintiffs were in direct contact

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[9] Sawmills cites *Hewitt v. Joyner,* 940 F.2d 1561, 1564 (9th Cir.1991) in support of its proposition. This case, however, is neither binding nor persuasive authority to this Court because it was decided on California State Constitutional grounds; not the federal Constitution.

with the seal because it was prominent throughout the city. Furthermore, the court found that the seal was offensive to the plaintiffs because it was a religious symbol. *See id.* Since plaintiffs were both in direct contact with the seal and were offended by it, the Tenth Circuit held that they suffered an injury sufficient to bring an establishment clause claim because they were in direct contact with a religious symbol and were offended by the religious symbol. *See id.* at 1232-33.

Here, the HPP does not advance any religious symbolism. Unlike the cases Sawmills cited, the HPP did not erect any religious symbol anywhere in Big Horn National Forest. Rather the HPP closed several roads and created a buffer zone around the Medicine Wheel. Furthermore, Sawmills does not allege that the Medicine Wheel itself offends it.[10] Even if it did, this Court could not redress that injury because even if it struck down the HPP it could not eliminate the Medicine Wheel as it is a protected National Monument. Furthermore, contrary to Sawmills' belief, it cannot assert constitutional standing based solely on the governments failure to act in accordance with the law. *See Babbitt,* 137 F.3d at 1205 *quoting Allen,* 468 U.S. at 754, 104 S.Ct. 3315 ("an asserted right to have the Government

[10] It is not clear whether a corporation has the capacity to be offended by religious symbolism as it is a fictitious person. Sawmills argues that the Supreme Court has held that a Corporation could suffer an establishment clause injury. *See Texas Monthly, Inc. v. Bullock,* 489 U.S. 1, 109 S.Ct. 890, 103 L.Ed.2d 1 (1989) (striking down Texas law that excluded religious magazines from state sales tax). In *Bullock,* the Court did find that a corporation had standing to sue, but the injury in that case was monetary, not offensiveness caused by direct contact with religious symbolism. Therefore, this Court believes that the law is not settled on whether a corporation could be religiously offended.

act in accordance with the [law] is not sufficient, standing alone, to confer jurisdiction on a federal court").

Sawmills' second injury as stated in its Response is that it is in direct contact with the effects of the HPP and it is offended by those effects. Like the problem above, Sawmills does not assert the necessary elements of an injury. Sawmills claims that its direct contact with the effects of the HPP constitutes an Article III injury.[11] Once again that is half of the Tenth Circuit law. In addition to being in direct contact with the offensive symbolism, the symbolism must offend the plaintiff for the plaintiff to suffer an injury. *See Foremaster,* 882 F.2d at 1491. In other words, religious symbolism without personal offense caused by that symbolism is not sufficient to constitute an injury in fact. *See id.*

Sawmills does not allege that Medicine Wheel offends it. Furthermore, it is unclear whether a for profit corporation has the capacity to be offended. Even if Medicine Wheel offended Sawmills this Court could not redress that injury because striking down the HPP would not do away with the Medicine Wheel.

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[11] Sawmills fails to cite a single Tenth Circuit case that employs this standard. Rather, Sawmills cites a Supreme Court case and a Fourth Circuit case. *Abington v. Schempp,* 374 U.S. 203, 83 S.Ct. 1560, 10 L.Ed.2d 844 (1963); *Suhre v. Haywood County,* 131 F.3d 1083, 1086 (4th Cir.1997). In *Abington,* the Supreme Court struck down a school prayer statute, without discussing any standing issues. Even though the Court discussed only the merits, its opinion focused on the impact of school prayer on students and parents who were not Christian. In *Suhre,* the Fourth Circuit held that intangible harm could constitute an injury in fact, but further found that being offended is the intangible harm necessary to constitute an establishment clause injury.

Sawmills' third injury as stated in its Response is that the NFS's use of tax dollars to further the Native American religion violates the establishment clause. The Supreme Court announced a special standing analysis for persons asserting standing as taxpayers. *See Valley Forge,* 454 U.S. 464, 478-79, 102 S.Ct. 752 ("a taxpayer will be a proper party to allege the unconstitutionality only of exercises of congressional power under the taxing and spending clause of Art. I, § 8, of the Constitution . . . [the taxpayer would also have to] show that the challenged enactment exceeds specific constitutional limitations upon the exercise of the taxing and spending power and not simply that the enactment is generally beyond the powers delegated to the Congress by Art. I, § 8."); *Flast v. Cohen,* 392 U.S. 83, 88, 88 S.Ct. 1942, 20 L.Ed.2d 947 (1968). In *Valley Forge,* an organization that advocated the separation of church and state, challenged the Secretary of Health, Education, and Welfare's decision to convey a "surplus" military hospital to a church-related college without compensation. *See Valley Forge,* 454 U.S. 464, 467-68, 102 S.Ct. 752. The organization argued that it had standing because its tax dollars were used to purchase and create the hospital and the government's subsequent grant of the hospital to a church-related college without compensation violated the establishment clause. *See id.* at 468, 102 S.Ct. 752.

The Supreme Court gave four reasons why the organization did not have standing to challenge the conveyance. Two of the reasons are directly relevant to the taxpayer standing issue in the instant case. First, the Court found that the organization was not challenging a congressional action but rather an executive decision to transfer a parcel of federal property. *See id.* at 479, 102 S.Ct. 752. The Court

stated that a plaintiff, alleging standing as a taxpayer, could challenge *only* congressional Acts. Because the organization was challenging an administrative Act, the Court held that the organization did not have standing to challenge the action. *See id.*

Second, the Court found that the organization was challenging an exercise of the Property Clause, Art. IV, § 3, cl. 2 because the organization was challenging the conveyance of the hospital. *See id.* at 480, 102 S.Ct. 752. The Court held that because the organization was not challenging a congressional decision to spend under Art. I, § 8, it did not have standing. *See id.*

Here, Sawmills challenges a NFS act, the passage of the HPP. The NFS is an administrative agency. Sawmills is not challenging a congressional action. Furthermore, NFS did not enact the HPP, which includes a grant for "interpreters" to educate visitors of Medicine Wheel about Medicine Wheel, pursuant to Congress' taxing and spending power. Rather, NFS enacted the HPP pursuant to its own regulatory authority. Therefore, this Court finds that Sawmills does not have taxpayer standing to challenge the HPP because Congress did not enact it and it is not an exercise of its taxing and spending powers.[12]

b. *Causation*

Sawmills has shown an injury in fact only with respect to its Complaint injuries, but not with respect to

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[12] This order will address the causation and redressability issues with respect to the all [sic] other alleged injuries. With respect to the taxpayer standing issue, however, the *Valley Forge* test is dispositive. Therefore, this order will not devote further discussion to this issue.

its Response injuries. Nevertheless, this order will discuss causation in this section and redressability in the following section with respect to all the injuries. It is important to note that Sawmills must satisfy all three essential elements for standing because the standing inquiry is a conjunctive inquiry, not a disjunctive one. *See Defenders of Wildlife,* 504 U.S. at 560-61, 112 S.Ct. 2130.

To prove causation, Sawmills must show that its injuries were caused by the HPP. *See id.* In the realm of standing, causation simply means that the challenged action caused the plaintiff's injury. *See id.* Assuming that all of the asserted injuries above were injuries in fact, then it cannot be disputed that the HPP caused the injuries stated in the complaint and Sawmills' injury as a taxpayer. This is because the *status quo,* as Sawmills characterizes it, changed as a result of the HPP.

Nevertheless, the HPP did not cause Sawmills' injury of being offended to the point that it has to avoid that area of Big Horn National Forest and it is Sawmills' direct contact with the Medicine Wheel that offended it. Congress designated Medicine Wheel as a National Monument before NFS passed the HPP. Therefore, even if those injuries constituted standing sufficient injuries, the HPP did not cause those injuries.

c. *Redressability*

The third inquiry in a standing analysis is whether the plaintiff's sought remedy would redress its injuries. An injury is redressed when there is a "'substantial likelihood' that the relief requested will redress the injury claimed. . . . " *See Baca,* 92 F.3d at 1036. "[T]he loss of the possibility of obtaining a federal lease is not redressable by

a favorable decision." *Mount Evans v. Madigan,* 14 F.3d 1444, 1451 (10th Cir.1994); *see also State of Wyoming v. Lujan,* 969 F.2d 877, 882 (10th Cir.1992); *Ash Creek Mining Co. v. Lujan,* 969 F.2d 868 (10th Cir.1992).

In *Baca,* the plaintiff challenged the Secretary of Interior's decision to sell private property that he leased to private individuals. *See Baca,* 92 F.3d at 1036-37. The Tenth Circuit found that the plaintiff had no right to renew the lease at the end of the term, that the government properly terminated the lease, and that the court had no authority to order the agency to grant the plaintiff the lease. *See id.* at 1037 ("No court has the power to order the BLM or the Department of the Interior to grant Mr. Baca another grazing lease, because the very determination of whether to renew grazing permits and whether public lands should even be designated for grazing purposes are matters completely within the Secretary of Interior's discretion"). Therefore, the court held that the plaintiff did not have standing to challenge the sale because a favorable decision could not redress his injury of losing the leased property.

Sawmills' complaint injuries are that the HPP effectively barred parts of the Big Horn National Forest to logging. Sawmills alleges that those areas were designated for both logging and recreation and that the *de facto* change in its designation injures Sawmills because as a logging company it has lost potential logging area. However, nothing in the designation of Big Horn National Forest entitled Sawmills with a right to log, just a possible

right to log.[13] If this Court strikes the HPP, Sawmills will be in the same position it is now in that striking the HPP would not guarantee Sawmills the right to log in Horse Creek. Since striking down the HPP will not grant Sawmills a right to log, this Court cannot redress Sawmills' complaint injuries.

Furthermore, striking down the HPP will not redress Sawmills' first two Response injuries because Congress' decision to designate Medicine Wheel as a National Monument caused those injuries, not the HPP. Therefore, a favorable ruling by this Court will not redress any of Sawmills' injuries.

B. *The APA claim regarding the National Forest Service Management Act NFSMA.*

Sawmills second claim for relief is based on NFS's failure to follow its own regulations. *See* Response at 11; *see also Webster v. Doe,* 486 U.S. 592, 602 n. 7, 108 S.Ct. 2047, 100 L.Ed.2d 632 (1988); *Service v. Dulles,* 354 U.S. 363, 77 S.Ct. 1152, 1 L.Ed.2d 1403 (1957) (recognizing the right of federal courts to review an agency's actions to ensure that it has followed its own regulations); 5 U.S.C. § 706(2)(A), (D).

1. *Standing*

The APA provides that "[a] person suffering legal wrong because of agency action . . . is entitled to judicial

[13] Similar to *Baca* the decision to designate an area of the Big Horn National Forest for logging is solely and completely within the Secretary of Interior's discretion. *See* 43 U.S.C. §§ 315, 315b.

review thereof." 5 U.S.C. § 701. To establish standing under the APA, Sawmills must show that it has "suffered legal wrong" or is "adversely affected or aggrieved by action within the meaning of a relevant statute." *See Valley Forge,* 454 U.S. at 487 n. 24, 102 S.Ct. 752; *Southern Utah Wilderness Alliance v. Thompson,* 811 F.Supp. 635, 640 (D.Utah 1993). To establish a grievance within the meaning of the relevant statute, Sawmills must show that its injury is "arguably within the zone of interests to be protected or regulated by the statute," in addition to the Article III standing requirements. *See Valley Forge,* 454 U.S. at 487 n. 24, 102 S.Ct. 752 ([n]either the Administrative Procedure Act, nor any other congressional enactment, can lower the threshold requirements of standing under Art. III); *Western Shoshone Business Council v. Babbitt,* 1 F.3d 1052, 1055 (10th Cir.1993). Sawmills must also show that there has been some "final agency action." *See Babbitt,* 137 F.3d at 1203. Since the NFMA does not provide for judicial review of Forest Service decisions general provisions of the APA apply.

Sawmills alleges that it suffered a legal wrong and has been adversely affected by NFS's failure to follow the proper procedures in each of its actions that amended the Forest Plan and changed management prescriptions. Sawmills also alleges that Forest Plan Amendment 12 constituted a final agency action and that timber rights are within NFMA's zone of interest.[14] As such, Sawmills claims that it has standing to challenge Amendment 12.

NFS does not dispute the fact that the HPP and Amendment 12 are final agency actions and that timber

[14] Amendment 12 amended the forest plan to implement the HPP.

interests generally fall within the NFMA zone of interests. Nevertheless, NFS argues that Sawmills does not have standing to challenge Amendment 12 because it failed to satisfy Article III standing.

As demonstrated above, Sawmills has not satisfied the Article III standing requirements because it has not shown that it has suffered an injury that this Court could redress with a favorable decision. *See Defenders of Wildlife,* 504 U.S. at 560-61, 112 S.Ct. 2130. Sawmills, however, has demonstrated an injury in fact in that the HPP closed road 12; thereby, limiting the ability to log in areas accessed by road 12. *See supra,* at 1293. Moreover, Sawmills' NFMA claim seeks to enforce a procedural right. In *Defenders of Wildlife,* the Supreme Court stated that lesser redressability standards apply when a plaintiff seeks to enforce a procedural right:

> There is this much truth to the assertion that "procedural rights" are special: The person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy. Thus, under our case law, one living adjacent to the site for proposed construction of a federally licensed dam has standing to challenge the licensing agency's failure to prepare an environmental impact statement, even though he cannot establish with any certainty that the statement will cause the license to be withheld or altered, and even thought the dam will not be completed for many years. (That is why we do not rely, in the present case, upon the government's argument that, *even if* the other agencies were obliged to consult with the Secretary, they might not have followed his advice.) What respondents' "procedural rights" argument seeks, however, is quite different from this: standing for persons who have no concrete

> interests affected-persons who live (and propose to live) at the other end of the country from the dam.

Defenders of Wildlife, 504 U.S. 573 n. 7, 112 S.Ct. 2130. Under this lenient standard of redressability, this Court finds that Sawmills has standing to challenge the NFS under NFMA.[15]

C. *Sawmills' Federal Advisory Committee Act ("FACA") Claim*

The standing analysis under FACA is similar to the NFMA claim because FACA like NFMA does not have an enforcement provision. As such, all FACA claims fall under the APA.

Here, Sawmills claims that it suffered an injury because it was denied a right to participate in the planning of the HPP or Amendment 12. Sawmills argues it had a right to participate in the planning of the HPP and Amendment 12 because the "Consulting Parties" constituted an advisory group under FACA. It seeks an injunction to the HPP and Amendment 12 in order to cure this procedural error.

This Court does not believe that it can redress Sawmills' injuries by granting an injunction against the HPP or amendment 12 because doing so would not necessarily reinstate the Horse Creek timber sale. Nevertheless, the

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[15] This Court does not find that NFS's withdrawal of the Horse Creek timber sale to be a final agency action because the terms of the cancellation are plainly temporary and subject to rebidding after further consultation. *See* AR at 3828. Therefore, the Court holds that it does not have standing to review Sawmills' claim that NFS violated the NFMA by withdrawing the Horse Creek timber sale.

Court finds that Sawmills has standing under FACA because the ability to correct a procedural error is sufficient, on its own, to satisfy Article III standing requirements. *See Defenders of Wildlife,* 504 U.S. at 573 n. 7, 112 S.Ct. 2130.

D. *Sawmills' National Environmental Policy Act ("NEPA") Claim*

Sawmills third claim for relief is based on NFS's failure to enact a plan that furthers the goals of the NEPA. Sawmills argues that the HPP limits the timber harvesting area in Big Horn National Forest and as such, increases the risk of forest fire. It claims that it has standing under NEPA to challenge the HPP because it is located near Big Horn National Forest and is directly impacted by the increased possibility of forest fire. The analysis for NEPA claims are similar to the analysis used for APA claims.

1. *Standing*

In order to challenge the HPP and Amendment 12 under the NEPA, Sawmills must allege that its injury is within the zone of interests protected by NEPA; in addition to satisfying the Article III standing requirements. *See States Legal Foundation v. Glickman,* 92 F.3d 1228, 1232 (D.C.Cir.1996).[16] "Congress enacted the NEPA in

[16] Note that in *Glickman* the D.C. Circuit found that "on any given claim the injury that supplies constitutional standing" must be the same as the injury within the requisite "zone of interests" for purposes of prudential standing." *See Glickman,* 92 F.3d at 1232. Unlike the plaintiffs in *Glickman,* Sawmills did not allege that it suffered an aesthetic injury because of the increased risk of forest fire anywhere in

(Continued on following page)

order to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man." 42 U.S.C. § 4321. The purpose of the NEPA is to protect the environment, not the economic interests of those adversely affected by agency decisions. *See Glickman,* 92 F.3d at 1235-36. Therefore, a plaintiff who asserts purely economic injuries does not have standing to challenge an agency action under NEPA. *See id.*

As a first step, Sawmills must show that it has Article III standing. *See id.* at 1232. Sawmills alleges that it has suffered an injury because the HPP increased the chances of forest fire. This injury, however, is not sufficiently concrete to constitute an Article III injury. As stated above, an "injury in fact" must be imminent not speculative. *See Defenders of Wildlife,* 504 U.S. at 560-61, 112 S.Ct. 2130. Here, the chance of fire at a particular location within the Big Horn National Forest is too remote to constitute an injury. *Compare City of Los Angeles v. Lyons,* 461 U.S. 95, 103 S.Ct. 1660, 75 L.Ed.2d 675 (1983) (finding that threat of choke-hold is too remote to constitute an imminent injury sufficient for injunctive relief because the possibility of police choking the same plaintiff again was in the millions) *with Glickman,* 92 F.3d at 1233 (finding injury in fact even though threat of harm from forest fire was remote). Even if the increased possibility of forest fire was an injury in fact, striking down the HPP would not

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its complaint. Sawmills did attempt to amend its complaint to allege such injuries, but this court denied its motion for leave to amend because it held that it was untimely. Furthermore, unlike *Glickman,* Sawmills did not submit any affidavits supporting the proposition that it may suffer an aesthetic loss because it uses Big Horn National Forest for recreational purposes.

decrease that risk because it would not guarantee that the NFS would grant logging contracts. *See Madigan,* 14 F.3d 1444, 1451. Therefore, the harm is not redressable and Sawmills does not have Article III standing.

Assuming that Sawmills demonstrated Article III standing, it must still demonstrate that striking the HPP is in the NEPA's zone of interest. *See Glickman,* 92 F.3d at 1235-36. To do so, Sawmills must show that it has more than an economic interest in logging. *See id.* at 1236. Sawmills admits that the primary injury it suffered is economic, but contends that the HPP and Amendment 12 also affect the "human environment" of Sawmills employees and has therefore caused a lifestyle loss as well as economic loss. Sawmills, however, is the only named plaintiff in this suit. This Court denied Sawmills' attempt to amend its complaint to join individuals who have aesthetic interests in Big Horn National Park. As such, Sawmills' complaint alleges only an economic injury. As stated above, an economic injury is not enough to place Sawmills' interests within the NEPA's zone of interests. Therefore, Sawmills also lacks prudential standing to sue under the NEPA.

II. THE NFMA AND FACA CLAIMS ON THE MERITS

As discussed above, this Court finds that it has standing over two of Sawmill's four claims; namely, the NFMA and FACA claims. Below, the order will discuss these claims in turn. As discussed above, the appropriate standard for judicial review of NFS's action is the arbitrary and capricious standard of the APA. *See* 5 U.S.C. § 706(2)(A) & (C); *see also Motor Vehicle Mfrs. Ass'n v.*

State Farm Mut. Ins. Co., 463 U.S. 29, 41, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983); *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 414, 91 S.Ct. 814, 28 L.Ed.2d 136 (1971).

It is well-established that this standard is one of deference, and that the party claiming that the action was arbitrary or capricious must overcome a significant hurdle. *See Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43, 103 S.Ct. 2856. "All the agency need do is demonstrate it considered relevant factors and alternatives after a full ventilation of the issues, and that the choice[s] it made [were] reasonable based on these considerations." *Thomas Brooks Chartered v. Burnett*, 920 F.2d 634, 643 (10th Cir.1990); *citing American Mining Congress v. Marshall*, 671 F.2d 1251, 1255 (10th Cir.1982). Further, this Court "is not empowered to substitute its judgment for that of the agency." *Overton Park*, 401 U.S. at 416, 91 S.Ct. 814. Its task is simply to determine whether the agency's "decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Id.; Gallegos v. Lyng*, 891 F.2d 788, 790 (10th Cir.1989). The Court's review of the agency action is limited to the record before the agency at the time the agency made its decision. *Camp v. Pitts*, 411 U.S. 138, 142, 93 S.Ct. 1241, 36 L.Ed.2d 106 (1973).

A. *The NFS Fully Complied with the NFMA.*[17]

The Multiple-Use Sustained Yield Act ("MUSYA") provides for the management of the national forests. It directs the NFS to "best meet the needs of the American people [and] mak[e] the most judicious use of the land" under its jurisdiction. 16 U.S.C. §§ 528-531. The uses expressly authorized are diverse and include outdoor recreation, range, timber, watershed, and wildlife and fish. *See* 16 U.S.C. § 528.

Under the NFMA, the NFS conducts planning and resource management in each unit of the National Forest System through a land resource management plan (forest plan), which provides overall direction and general guidelines for natural resources management for up to fifteen years. *See* 16 U.S.C. 1604; *see also Ohio Forestry Ass'n v. Sierra Club,* 523 U.S. 726, 118 S.Ct. 1665, 140 L.Ed.2d 921 (1998). Each forest plan contains a summarized analysis of the management situation, forest multiple-use goals and objectives, including a description of the desired future condition of the forest and an identification of goods and services that are expected to be produced, multiple-use prescriptions, standards and guidelines, and monitoring and evaluation requirements. *See* 36 C.F.R. § 219.11.

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[17] Sawmills argues that amendment 12 violates both the APA and the NFMA. These arguments, however, do not involve distinct claims; because the NFMA lacks a judicial review provision, the allegations all relate to a single claim under the APA. *See Sierra Club v. Marita,* 46 F.3d 606, 610 n. 3 (7th Cir.1995).

1. *Procedures NFS must follow in amending a forest plan and the definition of a "significant impact"*

Forest Service regulations provide that a forest plan may be amended. *See* 36 C.F.R. § 219.8. The procedure that the NFS must follow with respect to amending a forest plan, depends on whether the amendment is deemed as significant. The regulation states, "[b]ased on an analysis of the objectives, guidelines, and other contents of the forest plan, the Forest Supervisor shall determine whether a proposed amendment would result in a significant change in the plan." *Id.* "If the change resulting from the proposed amendment is determined to be significant, the Forest Supervisor shall follow the same procedure as that required for development and approval of a forest plan." *Id.* This includes a procedure that involves identification by an interdisciplinary team of purpose and need, the adherence to specific planning criteria, the formulation and evaluation of alternatives, the preparation of an environmental impact statement pursuant to NEPA, and approval by the Regional Forester. *See id.* § 219.10(b), (c); *id.* § 219.12. If the change is determined to be nonsignificant, it may be implemented "following appropriate public notification and satisfactory completion of NEPA procedures." *Id.* § 219.10(f). The Forest Service Handbook provides guidelines for determining whether a forest plan amendment is significant based on such factors as timing, location and size, goals and objectives, and management prescriptions. *See* Forest Services Handbook 1901.12, ch. 5.32(3).

The Handbook lists "[t]he following factors . . . to be used when determining whether a proposed change to a forest plan is significant or not significant:"[18]

> a. Timing. Identify when the change is to take place. Determine whether the change is necessary during or after the plan period (the first decade) or whether the change is to take place after the next scheduled revision of the forest plan. In most cases, the later the change, the less likely it is to be significant for the current forest plan. . . .
>
> b. Location and Size. Determine the location and size of the area involved in the change. Define the relationship of the affected area to the overall planning area . . .
>
> c. Goals, Objectives, and Outputs. Determine whether the change alters long-term relationships between the levels of goods and services projected by the forest plan.
>
> d. Management Prescription. Determine whether the change in a management prescription is only for a specific situation or whether it would apply to future decisions throughout the planning area. Determine whether or not the change alters the desired future condition of the land and resources or the anticipated goods and services to be produced.

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[18] The Handbook provides that "[o]ther factors may also be considered, depending on the circumstances." Forest Service Handbook 1909, 12, ch. 5.32(3).

2. *Amendment 12 is a nonsignificant change to the forest plan*

The first factor the NFS must consider in determining whether an amendment is significant is timing. The forest plan at issue was adopted in 1985. AR 3892. The changes effected by Amendment 12 occurred after the first decade that the forest plan was in place and late in the planning period. This supports a finding of nonsignificance. *See* Forest Service Handbook 1909.12, ch. 5.32(3)(a).

Second, the size of the area affected is relatively small when compared to the overall planning area, *see id.* ch. 5.32(3)(b) ("Define the relationship of the affected area to the overall planning area"). The entire 18,000 acres within the Area of Consultation comprises only 1.6% of the total acreage within the Big Horn National Forest. AR at 3891. Sawmills contends that "[t]he affected area comprises at least 10 to 15 percent of the Big Horn's total acreage designated as available for timber production." Even if this figure is accurate, it is irrelevant because the proper inquiry is to compare the affected area to the overall planning area. Here, the affected area is only 1.6% of the total planning area. This figure supports a finding of nonsignificance. *See* Forest Service handbook 1909.12, ch. 5.32(3)(b).

Third, the Forest Service concluded that Amendment 12 would have "very few direct, indirect, or cumulative effects to the goals, objectives, or outputs projected in the Forest Plan" because the "amendment is specific in nature and affects only a small area for a specific situation." AR at 3839. This Court agrees that the Amendment is specific in nature and affects only a specific area as it affects only those portions of Big Horn National Forest that are

adjacent to the Medicine Wheel. Nevertheless, Sawmills argues that Amendment 12 affects outputs of timber because it may limit areas of logging within Big Horn National Forest because it close [sic] road 12 to log hauling.[19] This Court finds Amendment 12 does limit logging, however, the effect is not significant. NFS reasonably determined that the potential decrease in timber output was nonsignificant because it found that only 10% of the area within the 18,000 acres of the area of consultation was suited for logging. *See* AR at 2672; *c.f.* AR at 2818 (Sawmills' appeal of finding of no significant impact stating that more than 10% of the are [sic] of consultation is suitable for logging).[20] This is equivalent to only 1,800 acres in the entire forest. Furthermore, the administrative court found that NFS's closure of road 12 did not eliminate the possibility of logging within the area of consultation, but rather placed a temporary restriction on logging until NFS identified alternative routes to the timber areas. *See* AR 2828, 2833. Consideration of the "Goals, Objectives, and Outputs" factor also supports the nonsignificance determination. *See* Forest Service Handbook 1909.12, ch. 5.32(3)(c).

Fourth, the Forest Service determined that the change in the management prescription is only for a

---

[19] It is important to note that Sawmills failed to reveal that any log hauling ever took place on road 12. *See* AR at 2837.

[20] This Court acknowledges that there is a dispute regarding this point, however, Sawmills' arguments are conclusory and do not cite authority or figures in support of its position that more than 10% of the area of consultation is suitable for logging. This Court is not a forestry expert and is not able to make that determination on Sawmills' bare allegations. Therefore, the court will defer to the NFS's findings because it reviews under a deferential standard.

specific situation. *See* AR at 5334; AR at 3891. The administrative court repeatedly stated that the HPP only affected the area of consultation in order to comply with the American Indian Religious Freedom Act, the National Historic Preservation Act, and the federal laws and policies. *See* AR 2827. Moreover, the administrative court stated that long term goal of the HPP "is to develop alternative access to achieve more effective protection and management." *Id.* The administrative record is full of documents and findings that support the administrative court's decision. *See, e.g.,* AR at 2384-2385. Therefore, the "Management Prescription" factor balances in favor of a nonsignificance determination.

In addition to its claim that Amendment 12 was a significant change in the forest plan, Sawmills argues that NFS violated public participation requirements of the NFMA in enacting Amendment 12. This Court finds that NFS did not err in determining that Amendment 12 was nonsignificant. Therefore, NFS did not have to allow for meaningful public participation under the NFMA; it had only to provide appropriate public notification and it had to satisfactorily complete NEPA procedures. *See* C.F.R. § 219.10(f).

The NFS's actions here readily meet that standard. The NFS has kept the public notified of the development of the HPP and management pursuant to it, and it has afforded the public ample opportunities to participate in the planning process. The PA and HPP were developed in response to numerous public comments critical of an earlier proposal described in the 1991 DEIS, and the PA

and HPP took into account public concerns.[21] Moreover, the Forest Service's release of NEPA documents allowed the public an adequate opportunity to comment on the adoption of the HPP. *See* AR 2498-99 (press release announcing completion of the draft EA and inviting comments). Indeed, Sawmills itself admits that it "has participated in the planning for the Medicine Wheel National Historic Landmark and submitted comments on the draft Environmental Assessment for this decision." AR at 2803. In one instance of such participation, the Forest Service Supervisor and District Ranger met specifically with the Plaintiff on June 24, 1996 to discuss the HPP and to solicit its input. *See* AR at 2826. At this meeting, Sawmills was "given a draft of the proposed vegetation and timber management sections of the proposed HPP to review" and was "asked to participate and attend future information sharing meetings." *Id.*

In lieu of the foregoing paragraphs, the Court finds that NFS provided sufficient public notification of the forest plan and properly followed NEPA procedures. Therefore, the Court holds that the NFS did not act arbitrarily, capriciously, or abuse its discretion by finding

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[21] *See, e.g.*, AR at 1154-61, 1189, 1232 (describing February 1993 "strategy development workshop," which was open to the public and attended by numerous individuals and representatives of different interests); AR at 1763 (press release describing January 1994 meetings, including forum open to public); AR at 2784 (noting that "scoping has been ongoing [since 1988] and has included meetings, press releases, radio and television coverage, and articles in local and regional newspapers"); AR at 2898 (describing "intense public involvement encompassing not only local citizens, state and local governments, Indian tribes, other Federal agencies, environmental and industry organizations, but literally the world").

that it properly followed the necessary notification procedures.[22]

B. *Consultations Pursuant to the PA and the HPP Were Not, And Are Not Subject to the Requirements of the Federal Advisory Committee Act.*

The FACA passed to establish Congressional oversight of the use of advisory committees by the executive branch. FACA imposes a number of requirements on advisory groups subject to its provisions regarding such matters as advance notice of committee meetings, the keeping of public availability of minutes, and the composition of advisory group membership. *See* 5 U.S.C.App. II §§ 2, 9-14. Although the language of the statute suggests a broad range of applicability, the Supreme Court has rejected a literal application of FACA because it would "cover every formal and informal consultation between the President or an Executive agency and a group rendering advice." *Public Citizen v. United States Dep't of Justice,* 491 U.S. 440, 453, 109 S.Ct. 2558, 105 L.Ed.2d 377 (1989).

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[22] Sawmills also alleges that the NFS violated the NFMA by not considering a reasonable range of alternatives before approving Amendment 12. Because the Court has held that Amendment 12 was not a significant change, the NFS did not have to comply with that portion of NEPA. Furthermore, this Court does not have jurisdiction to adjudicate the NEPA claim, as a stand alone claim, because this Court has held that Sawmills does not have standing to challenge the NFS under NEPA.

1. *Consultations here are exempt from FACA*

FACA contains a number of exemptions that limit its applicability. *See, e.g.,* 5 U.S.C.App. II § 4. The consultations here among the "Consulting Parties" to the HPP are exempted from the requirements of FACA under one such exemption for intergovernmental consultations. Under that exemption, the statute's requirements do not apply to:

> actions in support of intergovernmental communications where –
>
> (1) meetings are held exclusively between Federal officials and elected officers of State, local, and tribal governments (or their designated employees with authority to act on their behalf) acting in their official capacities; and
>
> (2) such meetings are solely fore [sic] the purpose of exchanging views, information, or advice relating to the management or implementation of Federal programs established pursuant to public law that explicitly or inherently share intergovernmental responsibilities or administration.

2 U.S.C. § 1534(b).

This exemption from FACA, was enacted as part of the Unfunded Mandates Reform Act ("UMRA") of 1995.[23] Under the well-established principles of administrative

[23] Even though the NFS passed the HPP before the enactment of the UMRA, it retroactively applies in the instant case because the intergovernmental exemption was passed to "clarif[y] Congressional intent" with respect to intergovernmental communications, H.R. Conf. Rep. 104-76, at 40 (Mar. 13, 1995).; *see also Farmers Tel. Co. v. FCC,* 184 F.3d 1241, 1250 (10th Cir.1999) (rule that merely clarifies or explains existing law is "interpretive rule" that may be applied to pre-rule facts without raising retroactivity concerns).

interpretation, such regulatory guidance is to be accorded substantial deference by the judiciary. *See Chevron, U.S.A., v. Natural Resources Defense Council* 467 U.S. 837, 843-44, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984).

The guidelines and instructions issued pursuant to § 1534(c) by the Office of Management and Budget ("OMB") explain that the intergovernmental exemption to FACA is sweeping in scope. Specifically, the exemption "applies to all Federal agencies subject to FACA" and to "*any* meetings called for any purpose relating to intergovernmental responsibilities or administration."[24] 60 Fed.Reg. 50,651, 50,653 (1995) (emphasis added). Thus, the exemption "is not limited to the intergovernmental consultations [regarding regulatory proposals containing significant Federal intergovernmental mandates,] but instead applies to the entire range of intergovernmental responsibilities or administration." *Id.* This broad construction of the exemption is "[i]n accordance with the legislative intent," which is "to facilitate intergovernmental communications on responsibilities or administration." *id.; see* H.R. Conf. Rep. 104-76, at 40 (March 13, 1995) ("an important part of efforts to improve the Federal regulatory process entails improved communications with State, local, and tribal governments"); *see also* 60 Fed.Reg. at 50,653 ("This exemption applies to meetings between Federal officials and employees and State, local, or tribal governments, acting through their elected officers, officials, employees, and Washington representatives, at which 'views, information, or advice' are exchanged concerning

[24] In addition to the exception to FACA, the Court notes that the National Historic Preservation Act explicitly authorizes programmatic agreements. *See* 36 U.S.C. 800.13(a)(3).

the implementation of the intergovernmental responsibilities or administration, including those that arise explicitly or implicitly under statute, regulation, or Executive order").

Here, the intergovernmental exemption applies to all consultations previously conducted under the PA and now conducted pursuant to the HPP. *See* AR at 2832-33. First, all of the Consulting parties are within the class of parties described in the exemption: the Forest Service, Advisory Council, and the Federal Aviation Administration are Federal entities; the State Historic Preservation Officer is a State government official; the Big Horn County Commissioners are a local governmental entity; and the Coalition and Alliance have been designated by tribal governments to act on their behalf with respect to the Medicine Wheel.[25]

Second, the subjects of the consultations fall squarely within the language of the exemption and OMB's implementing regulations – the consultations on the new undertakings within the Area of Consultation to determine potential effects and means of mitigating such effects involve the "exchange of views, information, or advice relating to the management" of the Medicine Wheel by the Forest Service. *See* AR at 2620-26; 2 U.S.C. § 1534(b)(2). These consultations, as well as the consultations leading

[25] *See, e.g.*, AR at 772 (alliance request for consulting party status, signed by elders from various tribes); AR at 9188 (letter indicating that Northern Arapaho elders in Coalition represent and are authorized to act on behalf of the Northern Arapaho Tribe); AR at 1172 (letter indicating that the Coalition represents Northern Cheyenne through tribal representatives to the Coalition); AR at 1786-87 (letter indicating that Alliance represents Fort Peck Tribes through tribal representatives to Alliance); AR at 2498 (Forest Service press release affirming that Alliance and Coalition represent tribal governments).

to the adoption of the HPP, fulfill the Forest Service's obligation under the NHPA to consult with the other Federal, State, and local agencies and Indian tribes with respect to preservation-related activities. *See* 16 U.S.C. § 470h-2(a)(2). Therefore, this Court holds that NFS did not violate FACA by not allowing Sawmills to participate in consultations because the Consulting Parties were exempt from FACA requirements.

Accordingly, for the reasons stated above, the Court grants NFS's motion to dismiss. It is therefore

ORDERED that NFS's motion to dismiss is **PARTIALLY GRANTED**. It is further

ORDERED that NFS's motion for judgment on the merits of the remaining claims is **GRANTED**.

JUDGMENT

This action came before the Court on pleadings, Honorable Alan B. Johnson, District Judge, presiding. The Court, having reviewed carefully the briefs of the parties, the applicable law, all matters of record, and being fully advised finds in favor of the defendant and defendant-intervener. It is,

ORDERED, ADJUDGED AND DECREED that plaintiff Wyoming Sawmills, recover nothing of the defendant United States Forest Service. It is further

ORDERED, ADJUDGED AND DECREED that defendant United States Forest Service, shall recover its costs, upon the filing of a bill of costs with the Clerk of the Court within ten (10) days of the date of entry of this Judgment. It is further

ORDERED, ADJUDGED AND DECREED that each party bear its own attorney's fees.

D.Wyo.,2001.

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

WYOMING SAWMILLS INCORPORATED, a Wyoming corporation, Plaintiff-Appellant, v. UNITED STATES FOREST SERVICE, et al., Defendants-Appellees, and MEDICINE WHEEL COALITION ON SACRED SITES OF NORTH AMERICA, Defendant-Intervenor-Appellee, NATIONAL CONGRESS OF AMERICAN INDIANS, et al., Amici Curiae.	No. 02-8009

ORDER

Filed December 3, 2004

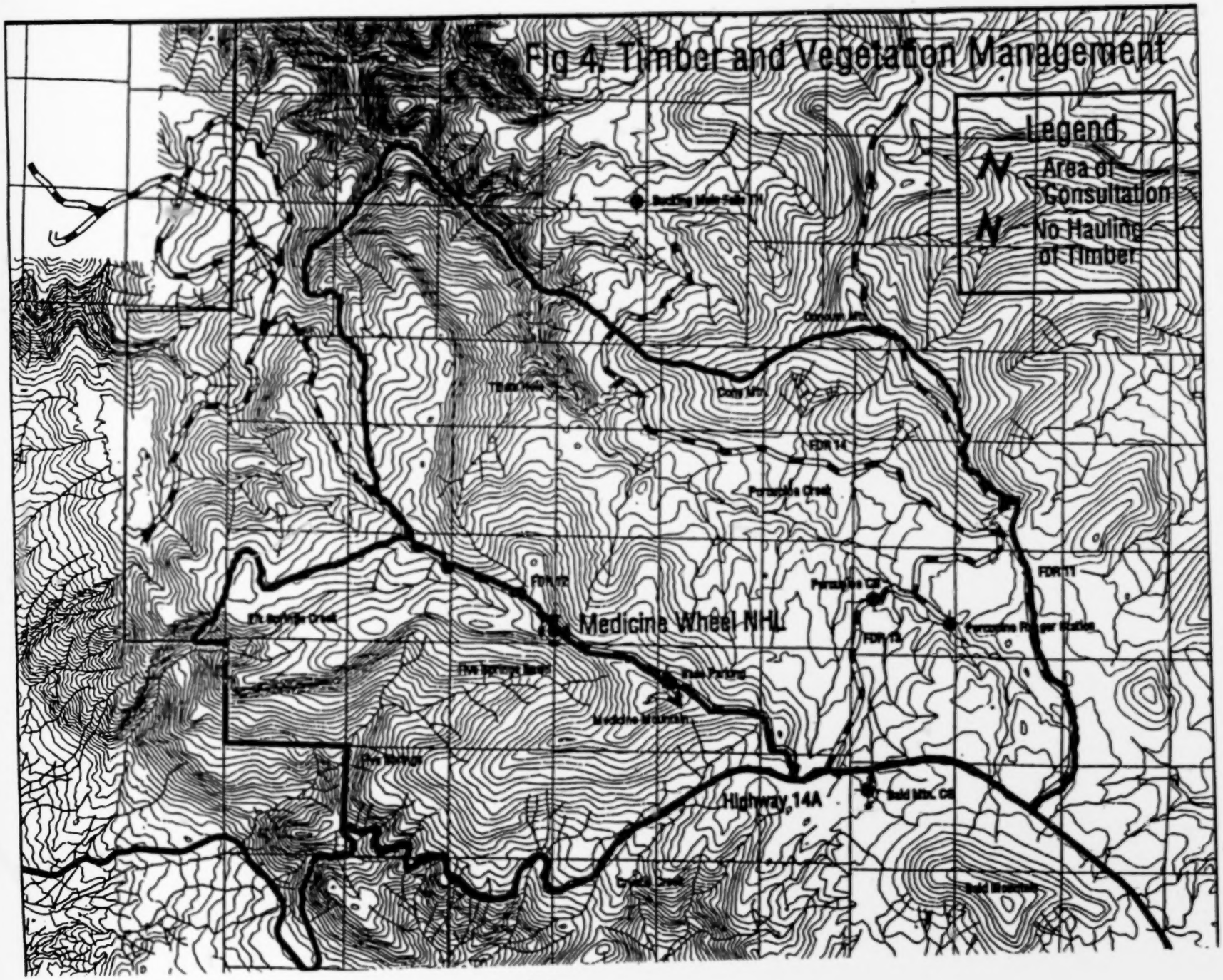
Before **HENRY**, **HOLLOWAY**, and **MURPHY**, Circuit Judges.

Appellant's petition for rehearing is denied by the panel.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court
PATRICK FISHER,
Clerk of Court

by: /s/ [Illegible]
Deputy Clerk



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Supreme Court, U.S.
FILED
MAY 4 - 2005
OFFICE OF THE CLERK

No. 04-1175

In The Supreme Court of the United States

WYOMING SAWMILLS, INC.,

Petitioner,

v.

UNITED STATES FOREST SERVICE;
MICHAEL JOHANNS, Secretary of Agriculture;
DALE BOSWORTH, Chief, United States Forest Service;
RICK CABLES, Regional Forester, Region II; and
BILL BASS, Forest Supervisor, Bighorn National Forest;

and

MEDICINE WHEEL COALITION ON
SACRED SITES OF NORTH AMERICA,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether petitioner has standing to challenge an Historic Preservation Plan, memorialized by a Programmatic Agreement developed pursuant to the National Historic Preservation Act, 16 U.S.C. 470 *et seq.*, that was signed by the United States Forest Service, federal and state historic preservation agencies, the local county government and representatives of Indian tribes and whose purpose is to better protect the Bighorn Medicine Wheel National Historic Landmark.

2. Whether the Historic Preservation Plan violates the Establishment Clause, U.S. Const., Amend 1.

CORPORATE DISCLOSURE STATEMENT

There is no parent corporation of the Medicine Wheel Coalition on Sacred Sites of North America and no publicly held company owns shares in the corporation.

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BRIEF IN OPPOSITION

Respondent Medicine Wheel Coalition on Sacred Sites of North America respectfully requests that the Petition for Writ of Certiorari be denied.

STATEMENT OF THE CASE

The questions as presented by the petitioner are based upon an incomplete and, at times, erroneous recitation of the facts. Specifically, the claim that 50,000 acres of the Bighorn National Forest are "now off limits to timber harvesting" and being managed as a "sacred site" where all human activity other than Native American religious activity is being excluded is a patent falsehood. Rather, the factual underpinning of this case is as follows.

The Bighorn Medicine Wheel National Landmark is a stone circle approximately 80 feet in diameter with twenty-eight spokes extending from a central cairn to the perimeter. It was constructed hundreds (perhaps thousands) of years ago and is located at an altitude of 10,000 feet in the Bighorn National Forest of Wyoming. Resp. Ap. at 19.[1] To Plains tribes, the Medicine Wheel and Medicine Mountain on which it is located is an important traditional cultural property and sacred ceremonial site actively utilized by traditional cultural and religious practitioners

[1] Resp. Ap. refers to the Appendix filed with the Tenth Circuit Court of Appeals by the defendants/respondents United States Forest Service *et al.* Aplt. Ap. refers to the Appendix filed with the Tenth Circuit by petitioner Wyoming Sawmills (the appellant before the Tenth Circuit).

of those tribes. *See*, e.g., Resp. Ap. at 19, 136, 149-163, 252, Aplt. Ap. at 95, 283.

In 1988, the Bighorn National Forest ("Forest") began to recognize that its management of the Medicine Wheel was inadequate and developed a proposal to modify management of the site. Extensive public meetings were held and comments received. Resp. Ap. at 23-24. That process resulted in the preparation of a draft Environmental Impact Statement (EIS) in May 1991. The EIS recognized that the management of the Medicine Wheel National Historic Landmark by the Forest had failed to prevent the degradation of the Medicine Wheel, including damage to and destruction of archeological resources. It also found that there had been a failure to recognize and protect Native American cultural values. Resp. Ap. at 24-28.

Following the issuance of the draft EIS, the Advisory Council on Historic Preservation informed the Forest that it needed to fulfill its requirements under the National Historic Preservation Act ("NHPA"), 16 U.S.C. 470 *et seq.*, by engaging in a Section 106[2] review and consultation. Resp. Ap. at 115-117. In July 1991, the Forest commenced the section 106 process. Resp. Ap. at 120. In January 1992, the Forest agreed (as did the Advisory Council and Wyoming State Historic Preservation Office) that the Medicine Wheel Coalition on Sacred Sites of North America should be given consulting party status within the meaning of the NHPA and stated that "[t]he objectives of the 106 process . . . will be to consult on development of a long range management strategy for the Medicine Wheel." Resp. Ap.

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[2] Section 106 is codified at 16 U.S.C. 470f.

at 766. Later that year, the Medicine Wheel Alliance and Big Horn County Commissioners were also granted consulting party status.[3] Resp. Ap. at 174.

After a number of meetings, including a large three-day public meeting, and exchanges of correspondence between the consulting parties, *see* Resp. Ap. at 23-24, 179-186, 189-190. Aplt. Ap. at 91, a Memorandum of Agreement ("MOA") was signed by the six consulting parties in June 1993. Aplt. Ap. at 91-100, Resp. Ap. 240, 245-246. The MOA recognized that the increased numbers of "recreational visitors" had caused "unprecedented damage to the Medicine Wheel and surrounding area" and that the Medicine Wheel and Medicine Mountain qualified as a "traditional cultural property" within the meaning of the NHPA. Aplt. Ap. at 91. The MOA established a temporary management system that included some limitations on vehicular access, on-site interpreters "to help monitor public use, and to educate and sensitize visitors to the traditional cultural importance of the Medicine Wheel" and accommodation of traditional ceremonial use by Indians. Aplt. Ap. at 92, 94, 95. The MOA also provided that the signatories would work toward a Programmatic Agreement and Historic Properties Management Plan to ensure the "long-term protection and continued traditional cultural use of the Medicine Wheel" and the "development of management goals which provide for public enjoyment of the Medicine Wheel in a manner that does not conflict

[3] The Medicine Wheel Coalition is a political advocacy organization of traditional cultural leaders designated by several Plains tribes. Resp. Ap. at 191-195. The Alliance is an activist group including both members of federally recognized Indian tribes and environmentalists. Resp. Ap. at 175-177. Neither organization is a religious organization.

with the traditional cultural or archaeological values that make this Landmark nationally significant." Aplt. Ap. at 96.

Following additional consultation between the parties and with the public, *see, e.g.*, Resp. Ap. at 196-198, 225, 236-237, 243-247, the parties to the MOA, as well as the Federal Aviation Administration which operates a radar dome on Medicine Mountain, entered into a Programmatic Agreement ("PA1") in August 1994. PA1 continued the interim MOA management procedures and also included procedures governing the development of a long-term Historic Preservation Plan ("HPP"). Aplt. Ap. at 382-400.

A two year process was then commenced during which archeological and ethnographic surveys were prepared, consultations held and draft HPP provisions were circulated for review and comment. Aplt. Ap. at 147-148, 235-254, Resp. Ap. at 5333. The entire process continued to be open to the public, *see, e.g.*, Resp. Ap. at 201-202, 204-205, 219-222, and specifically included representatives of the local community – the Big Horn County Commissioners.

In September 1996, a Programmatic Agreement ("PA2") and HPP were approved by the seven consulting parties. Resp. Ap. 2510-2511; Aplt. Ap. at 423-428. On October 7, 1996, the Forest adopted Forest Plan Amendment No. 12 to implement the HPP. Aplt. Ap. at 573-575.

The primary purpose of the HPP was "to establish a process for integrating the preservation and traditional uses of historic properties with the multiple use mission of the Forest Service, in a manner that gives priority to the protection of the historic properties involved by continuing

traditional cultural use consistent with Section 110(f)[4] of the National Historic Preservation Act." *Wyoming Sawmills v. United States Forest Service*, 179 F.Supp.2d 1279, 1287 (D.Wyo. 1999), *affd.* 383 F.3d 1241 (10th Cir. 2004). In so doing, it recognized the Forest's obligation under the American Indian Religious Freedom Act, 42 U.S.C. 1996, and Executive Order 13,007 (1996) "to manage the Medicine Wheel and the Medicine Mountain environment in a manner that is sensitive to and respects the spiritual importance of these locations to Native American traditional religious practitioners." Aplt. Ap. at 314. However, as noted by the Big Horn County Commissioners in their introductory statement to the HPP, it does so "while providing for multiple use of Forest Lands that contribute to our economy and lifestyle." *Id.*

Among other things, the HPP provides for:

- Consultation with all of the parties to the HPP whenever a governmental undertaking may impact upon the Medicine Wheel HPP Management Area. This consultation is in lieu of consultation pursuant to section 106 implementing regulations. 36 C.F.R. Part 800. The Management Area varies depending upon the activity involved. At its largest, it is equal to approximately 18,000 acres or less than 2% of the land area of the Forest which contains 1,107,670 acres. Resp. Ap. at 228, 4073. Of the 18,000 acres, only 10% is currently suited for timber production. Aplt. Ap. at 347. The Forest reserves the authority to make all final decisions regarding projects in the Management Area, Aplt. Ap. at 273, and

[4] 16 U.S.C. 470h-2(f).

there is a specific requirement to provide the public with the opportunity for input as well. Aplt. Ap. at 299-300.

- Restrictions upon vehicular access to the Medicine Wheel along FDR 12 (the road that goes past the Wheel) similar to those in the initial MOA; visitors to the site must hike approximately a mile and a half to reach the site; vehicular traffic on FDR 12 is permitted, however, in the case of handicapped and emergency vehicles or vehicles accessing land northwest of the Medicine Wheel for ranching, hunting or other recreational purposes. Aplt. Ap. at 299, 301. In 1998, 20,055 people visited the Medicine Wheel, of which 841 were Native Americans. Resp. Ap. at 223-224. Thus, there has continued to be a considerable amount of tourist visitation at the site in the post-HPP era.

- Future development of a timbering plan for the area which incorporates both the statutory and forest health needs of the Forest Service, as well as traditional Indian perspectives; logging is specifically permitted when necessary "for maintaining the overall health of the Forest"; FDR 12 is closed to logging traffic; this closure, however, did not change the *de facto* status of FDR 12 since timber has not been hauled on that road within recent memory and, in fact, a timber sale was withdrawn in the 1980s because of concerns about logging truck traffic near the Medicine Wheel. Aplt. Ap. at 348, Resp. Ap. at 216. All suitable timber within the Management Area can be accessed by FDR 12 below the closure or by other roads. Resp. Ap. at 2828. No restriction upon hauling timber

on other roads in the consultation area, specifically FDR 11 and 14, is stated in the HPP.

- Continuation of intensive grazing within the Management Area, but management of the grazing to protect springs in the area and direct the grazing away from the vicinity of the Medicine Wheel. Aplt. Ap. at 362-364.

- Retention of the quality of the viewshed from Medicine Wheel and Medicine Mountain. Aplt. Ap. at 309-310.

- Time-limited opportunities for traditional ceremonial use of the site without disturbance, upon request. Aplt. Ap. at 314-315.

- Continued monitoring of the area by the parties to the agreement; said monitoring meetings are specifically open to the public. Aplt. Ap. at 368.

- Submission of a nomination to the Park Service for expansion of the Medicine Wheel National Historic Landmark boundary. Resp. Ap. at 207.

In 1996, the Horse Creek Timber Sale was proposed for bidding. During the scoping process, some limited consultation took place with the consulting parties to the HPP. Resp. Ap. at 218. Respondent Medicine Wheel Coalition specifically indicated that its representatives needed to visit the site as part of the consultation process. Resp. Ap. at 248. Although this never occurred, a bid package was prepared and disseminated by the Forest. Aplt. Ap. at 513-533. In September 1997, the sale was discussed at a meeting of the parties to the HPP. It became clear at that time that adequate consultation, as required by Section 106 of the NHPA, had never taken place. Resp.

Ap. at 249-251. As a result, the sale was postponed until further consultation could take place. Aplt. Ap. at 534. A review was done by the Medicine Wheel District Ranger wherein he concluded that not only was consultation inadequate, but that a moratorium on logging in roadless areas and inadequacies in the environmental analysis dictated withdrawal of the sale for the present time. Aplt. Ap. 563-570. However, the Forest specifically reserved the right to list the sale in the future and to use FDR 11 and 14 for logging trucks if appropriate. Aplt. Ap. at 571-572.

ARGUMENT

I. THE TENTH CIRCUIT RULING THAT PETITIONER LACKED STANDING IS CORRECT, IS BASED UPON THE SPECIFIC FACTS OF THIS CASE, AND WILL NOT HAVE SIGNIFICANT PRECEDENTIAL VALUE

Article III of the Constitution limits judicial power to the resolution of "cases" or "controversies". One of the requirements of a case or controversy is that a plaintiff must have standing to challenge the action sought to be adjudicated in the lawsuit. As stated in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992), in order for a plaintiff to have standing, it must show that it has suffered an injury in fact that involves a "legally protected interest" that is both "concrete and particularized" and "actual or imminent, not conjectural or hypothetical", that the injury is traceable to the actions of the defendant and that it is "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision."

Petitioner rests its claim of standing to challenge government action based upon an alleged violation of the Establishment Clause, U.S. Const., Amend 1, on two grounds – a lost opportunity to bid for timber contracts within portions of the Forest in general, and for the proposed Horse Creek timber sale specifically, and because it "has direct contact with government endorsement of religious symbols" in a public place. (Pet. Br. at 7-11) It asserts that the negative holdings of the Tenth Circuit Court of Appeals on both of these issues conflict with Supreme Court precedent and precedent from other Circuits. However, the conflicts that petitioner presents are illusory when the actual facts of this case are considered and compared to the past precedents cited by petitioner. Unlike the cases cited, the facts here show that there is no injury in fact attributable to the HPP and, even if injury is assumed, it is not redressable by a decision from this Court or any other Court.

Petitioner's lack of standing results from a straightforward application of the law of standing to the facts of this case. As the District Court below observed, "[t]he facts do not suggest that Sawmills had an entitlement to log anywhere in Big Horn National Forest." 179 F.Supp.2d at 1293. Thus, it is questionable whether petitioner has a "legally protected interest" sufficient to provide for standing.

Moreover, the record does not support a finding that the HPP has reduced the level of logging in the Bighorn National Forest. There are over 1.1 million acres in the Bighorn National Forest. Only about 18,000 acres are within the Management Area (also referred to as the Area of Consultation or "AOC") covered by the Historic Preservation Plan and only 1,800 acres within the AOC are

suitable for timber production.[5] Aplt. Ap. at 347. According to the Forest Plan, the Forest as a whole has a potential annual output of 49.0 million Board Feet, whereas the Forest Plan's annual objective for timber production is only 16.5 million Board Feet. Resp. Ap. at 4107. Clearly, there are many other areas within the Forest available for timber production. Thus, it is not surprising that petitioner has made no showing that the Forest is offering fewer board feet of timber for sale because of the HPP. Indeed, in its Environmental Assessment for the HPP, the Forest concluded that there would be no change in outputs projected in the Forest Plan as a result of the HPP. Aplt. Ap. at 635. That being the case, petitioner has shown no injury in fact from the HPP.

In addition to its general complaint, petitioner specifically complains that it lost an opportunity to bid for timber when the Horse Creek sale was withdrawn. But the Forest had no obligation to offer this sale at all and petitioner had no legally protected interest in the sale. Moreover, a memorandum from the Medicine Wheel District Ranger to the Forest Supervisor outlined a number of other problems which independent of the HPP caused the proposed timber sale not to be bid.[6] In short, the memo concluded that "we would have a hard time defending our decision [to allow the timber sale] based on process violations, conflicting

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[5] The HPP does not actually forbid logging within the AOC – it is permitted if necessary for forest health. Aplt. Ap. at 349-350.

[6] He concluded that the 1988 environmental assessment ("EA") was inadequate, the 1997 amendment to the EA was not legally permissible, that there were inconsistencies in the analysis on issues such as elk cover and regeneration and that there was a moratorium on timber sales in roadless areas that affected the viability of the Horse Creek sale. Aplt. Ap. at 567-570.

data, and incomplete NEPA analysis." Aplt. Ap. at 567-570. His memorandum makes clear that the Forest postponed the proposed sale because of a number of issues which had nothing to do with the HPP. All that took place pursuant to the HPP was consultation; the HPP mandated no particular decision as a result of that consultation. Thus, there was no direct nexus between the HPP and the injury that has been alleged by the petitioner based upon the withdrawal of the Horse Creek sale.

Even if it is assumed that the HPP caused petitioner injury, the likelihood of Court action redressing this injury is slim. Petitioner has no more than a hope that *if* the HPP is overturned, the Forest *might* authorize Horse Creek or some other timber sale, its bid *might* be accepted by the Forest Service and it *might* gain profit as a result. Even if the HPP and related documents were invalidated, the Forest Service would *not* be compelled as a result to re-bid the Horse Creek sale or offer any other sale or to award any bid to petitioner. Thus, it is very unlikely that the alleged injury suffered by Sawmills will be redressed by a favorable court decision. In short, the denial of standing was entirely consistent with Article III standing jurisprudence on this issue.

As the Tenth Circuit fully explained in its opinion, *Wyoming Sawmills, Inc. v. United States Forest Service*. 383 F.3d 1241, 1248-1249 (10th Cir. 2004), the factual bases for standing in the cases cited by petitioner were entirely different from this case and the cases are fully distinguishable. In *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 211 (1995), the plaintiff's claim was that it was unable to compete on an equal basis because of affirmative action requirements for Government contracts that were being offered on an ongoing basis. The injury in

fact was the loss of the ability to compete "on an equal footing" with other companies for contracts that would be offered by the government, a legally-protected harm which the court could redress, as opposed to a loss of profit caused by a discretionary government decision not to offer the contract at all.[7]

In *Watt v. Energy Action Ed. Found.*, 454 U.S. 151, 160-161 (1981), plaintiff California's claim was that the failure of the federal government to adequately test different bidding systems pertaining to off-shore drilling harmed its ability to maximize the amount of money from leases that would be awarded – money *that it had a statutory right to receive*. The Court found that an Order requiring the Secretary to test different systems would have a reasonable likelihood of securing California's *legally-protected interest* and thus the injury in fact was redressable.

Finally, in *Bryant v. Yellin*, 447 U.S. 352, 366-368 (1980), the Court found that if certain irrigation restrictions were enforced, it was very likely the land that the plaintiffs wanted to purchase would become available. Thus, unlike here, there was a "substantial likelihood" that the relief sought would address plaintiff's injury.

Petitioner raises two other arguments in its effort to convince this Court to grant *certiorari*. The first argument is based upon a line of cases where individuals who were

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[7] The 8th Circuit case cited by petitioner, *Arkla Exploration Co. v. Texas Oil & Gas Corp.*, 734 F.2d 347, 349, 353-354 (8th Cir. 1984), *cert. den.*, 469 U.S. 1158 (1985) is similar. It involved the right of the plaintiff to compete for a lease that the government decided to award, not an abstract loss of opportunity to bid for lands that might never be leased.

in contact with religious symbols on public land have had standing to raise First Amendment claims. Petitioner asserts that the denial of its claim of standing is in conflict with those cases. Essentially, the "directly affected" test applied in the line of cases cited by petitioner has been a mechanism to provide standing to individuals asserting non-economic injuries. *See, e.g., Foremaster v. City of St. George*, 882 F.2d 1485, 1489 (10th Cir. 1989), *cert. den.*, 495 U.S. 910 (1990). In most cases, those individuals have been forced to take steps to avoid the displays in question and have thereby been prevented from engaging in normal civic activities. *Id.* at 1489-1490.

As the Tenth Circuit held, however,

> [i]n its attempt to explain how it has been directly affected, plaintiff repeatedly refers to the alleged restrictions on timber cutting which it says will follow from the HPP . . . [Thus w]e discern no allegation separate from the alleged loss of opportunity for profitable logging.

[383 F.3d at 1247.]

In short, petitioner does not represent a group of individuals who are "directly affected" in a non-economic manner by the display of a religious symbol or sponsorship of a religious activity. As the Court below concluded, this for-profit corporation simply did not and was unable to assert anything *but* an economic injury. Thus, there is no legal inconsistency between the holding below and the

religious symbolism cases. Rather, the facts here are simply different.[8]

Finally, petitioner attempts to get this Court's attention by mischaracterizing language in the Tenth Circuit decision that "[a]s an artificial person, plaintiff has not shown how it experienced the kind of constitutional injury that has been found in such cases." 383 F.3d at 1247. Petitioner attempts to argue that this constitutes a broad holding that corporations have no standing to bring First Amendment claims. Pet. Br. at 11-14. The Tenth Circuit held nothing of the sort. In fact, it specifically found that it did not need to determine whether a corporation can make a claim based upon non-economic loss[9] because *the only concrete and particular injury in fact that the petitioner here actually alleged was the loss of the opportunity to bid for a contract to harvest timber for profit* – a purely economic loss. 383 F.3d at 1247.

In short, the Tenth Circuit opinion was well grounded in the law and was based upon the specific facts present in

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[8] These cases can also be distinguished factually by the nature of the "symbol" involved here which is not inherently religious to most people who view it. Rather, it is perceived by most Americans as a site of great archeological and historic significance that was in fact recognized as such when it was designated a National Historic Landmark. Indeed, as the District Court noted, even if the petitioner were "offended" by the Medicine Wheel, the Court "could not redress that injury because even if it struck down the HPP it could not eliminate the Medicine Wheel as it is a protected National Monument." 179 F.Supp.2d at 1295.

[9] We would argue that a for-profit corporate entity cannot be "religiously offended" within the meaning of these cases, but agree with the Tenth Circuit that such a finding was not necessary to deny standing to petitioner given the facts of this case.

this case. Thus, this case is of minimal precedential significance and *certiorari* ought to be denied.

II. THE ESTABLISHMENT CLAUSE ISSUE THAT THE PETITIONER SEEKS TO HAVE THIS COURT REVIEW IS NOT PROPERLY BEFORE THIS COURT

Neither the District Court nor the Tenth Circuit Court of Appeals ruled upon petitioner's claim that the Historic Preservation Plan violates the Establishment Clause, U.S. Const. Amend 1. Under those circumstances, it would be premature for the Court to consider this question. Rather, in the unlikely event that the court were to accept *certiorari* and reverse on the standing issue, it would be appropriate for the lower courts to consider this issue in the first instance. *See Duignan v. United States,* 274 U.S. 195, 200 (1929) ("It is only in exceptional cases coming here from the federal courts that questions not pressed or passed upon below are reviewed.")

Suffice it to say, the petitioner's Establishment Clause claim is based upon a complete distortion of the facts. It is simply untrue that all but Native Americans are excluded from 50,000 acres of the National Forest. *See* p. 4-6 of this brief, *supra*. Were the lower courts to review this issue, they would find that the Historic Preservation Plan clearly has many secular purposes and falls squarely within this Court's jurisprudence on the accommodation of religious free exercise, including the Court's observations about accommodating Native American activities at sacred sites in *Lyng v. Northwest Indian Cemeteries Assn.*, 485 U.S. 454 (1988) (although it held that the First Amendment Free Exercise Clause did not require that a road through a Native American sacred site be prohibited, the Court

commended and accepted as constitutional a variety of governmental actions designed to ameliorate the impact of the road upon religious practitioners because those actions would accommodate the free exercise of religion by the affected practitioners).

Thus, this Court should reject Petitioner's Question 2 as unsuitable for *certiorari*.

CONCLUSION

For all of the above reasons, this Court should deny the Petition for Writ of *Certiorari*.

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In The

Supreme Court of the United States

WYOMING SAWMILLS, INC.,

Petitioner,

v.

UNITED STATES FOREST SERVICE, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITIONER'S REPLY BRIEF

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ARGUMENT

I. WYOMING SAWMILLS HAS STANDING TO RAISE ITS ESTABLISHMENT CLAUSE CLAIM.

A. Wyoming Sawmills Lost The Opportunity To Bid On A Timber Sale.

The U.S. Forest Service ("Forest Service") and the Medicine Wheel Coalition on Sacred Sites of North America ("Coalition"), relying on *Region 8 Forest Service Timber Purchasers Council v. Alcock*, 993 F.2d 800 (11th Cir. 1993), argue that Wyoming Sawmills suffered no injury in fact because Wyoming Sawmills has no "legal right" to harvest timber. Respondents' Opposition ("Opp."), 7; Coalition Opp., 10. However, the Forest Service and the Coalition fail to explain why the decision of the Eleventh Circuit in *Region 8*, like the decision of the Tenth Circuit in *Wyoming Sawmills*, is not in direct conflict with the holdings of this Court. *See e.g., Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 211 (1995) (wrongful denial of opportunity to bid competitively for federal highway construction contracts constitutes "an invasion of a legally protected interest"); *Northeastern Florida Chapter of the Assoc. General Contractors of America v. City of Jacksonville*, 508 U.S. 656 (1993) ("injury in fact" required for standing is inability to compete in bidding process); *Bryant v. Yellen*, 447 U.S. 352, 367-68 (1980) (plaintiffs had standing because they sought to bid for property that "might become available" if a federal law took effect); *Watt v. Energy Action Educational Foundation*, 454 U.S. 151 (1981) (loss of an opportunity to bid for the exploration and development of mineral resources constitutes an injury). In fact, the Forest Service and the Coalition, by raising *Region 8* have demonstrated that the split described by Wyoming Sawmills

between this Court and the Tenth Circuit is ever widening.[1]

B. Wyoming Sawmills Has A Right To Nonarbitrary Land Classification.

The Forest Service argues that Wyoming Sawmills' reliance on *Arkla,* is misplaced because Wyoming Sawmills does not seek to "correct" the "bidding process." Respondents' Opp., 7-8. In so arguing the Forest Service conveniently ignores the express holding of *Arkla*, which is that the plaintiff had the right to have the federal lands in question "not classified arbitrarily" and to have the Secretary of Interior "utilize his discretion properly" when determining whether the specific federal lands would be leased for oil and gas exploration. *Arkla*, 734 F.2d at 354. Similarly, Wyoming Sawmills has the right to have 50,000 acres of the Bighorn National Forest "not classified arbitrarily" and to have the Forest Service "utilize [its] discretion properly," that is, consistent with the Establishment Clause, when determining whether those 50,000 acres would be available for timber production.

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[1] The rulings of the D.C. Circuit and the Eighth Circuit are consistent with the holdings of this Court. *Arkla Exploration Co. v. Texas Oil & Gas Corp.*, 734 F.2d 347 (8th Cir. 1985); *Mountain States Legal Foundation v. Glickman*, 92 F.3d 1228, 1233 (D.C. Cir. 1996) (a right to federal timber contracts is not required to show injury in fact).

C. Wyoming Sawmills Was "Directly Affected" By An Establishment Clause Violation.

The Forest Service argues that Wyoming Sawmills' "direct contact" with the decision by the Forest Service to manage 50,000 acres as a "sacred site" was not a cognizable injury, because "the psychological consequences presumably produced by observation of conduct with which one disagrees ... is not an injury sufficient to confer standing under [Article] III." Respondents' Opp., 9. Not surprisingly, the Forest Service cites no legal authority, let alone a ruling by this Court, for this novel proposition, which distorts and, if adopted, would destroy this Court's Establishment Clause jurisprudence. By so arguing, the Forest Service attempts to convert the constitutional violation that was given when the Forest Service designated 50,000 acres of federal land as a "sacred site" and off limits to Wyoming Sawmills into a non-justiciable emotional psychological reaction to offensive conduct.

Moreover, by so arguing, the Forest Service places itself in conflict with this Court, *e.g.*, *County of Allegheny v. ACLU*, 492 U.S. 573 (1989), as well as the Fourth, Sixth, Tenth, Eleventh, and D.C. Circuits, which recognize Establishment Clause standing based solely on allegations of direct personal contact with the offensive governmental embrace of a religious symbol in a public place. *Suhre v. Haywood County*, 131 F.3d 1083 (4th Cir. 1997); *Hawley v. City of Cleveland*, 773 F.2d 736 (6th Cir. 1985); *Saladin v. City of Milledgeville*, 812 F.2d 687 (11th Cir. 1987); *ACLU of Georgia v. Rabun County Chamber of Commerce*, 698 F.2d 1098 (11th Cir. 1983); *Allen v. Hickel*, 424 F.2d 944 (D.C. Cir. 1970); *Foremaster v. City of St. George*, 882 F.2d 1485 (10th Cir. 1989); *Anderson v. Salt Lake City Corp.*, 475 F.2d 29 (10th Cir. 1973). Were it left to the Forest

Service, it would have dismissed all of these plaintiffs because the psychological consequences of observing conduct that they disagreed with did not provide them Article III standing.

D. This Court's Religious Symbol Jurisprudence Applies To The Designation Of Federal Land As An Off-Limits "Sacred Site."

The Forest Service argues, as Wyoming Sawmills anticipated in footnote 2 of its Petition, that the Tenth Circuit's decision in *Wyoming Sawmills* does not conflict with those of other Circuits because the cases relied on by Wyoming Sawmills involved governmental displays of sectarian religious symbols on government property, and the present case does not involve the display of any religious item or symbol. Petition, 9; Respondents' Opp., 10.

The Forest Service's distinction is one without a difference, as this Court recognized in *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988), where it declared:

> Nothing in the principle for which [the American Indians] contend, however, would distinguish this case from another lawsuit in which they (or similarly situated religious objectors) might seek to exclude all human activity but their own from sacred areas of the public lands.

Lyng, 485 U.S. at 452-53. Whether the religious symbol is the Christian cross, carved from the trees of a forest, the Judeo-Christian Ten Commandments, carved from stone from beneath the earth, or an American Indian Medicine Mountain, whose sacredness includes the trees, the stone, and the earth itself, this Court's Establishment Clause

jurisprudence applies. Why else would this Court, as it did in *Lyng*, declare, "[t]he First Amendment must apply to all citizens alike, and it can give to none of them a veto over public programs that do not prohibit the free exercise of religion." *Lyng*, 485 U.S. at 452.

The Forest Service did not "display" Medicine Mountain's 20,000 acres and the surrounding 30,000 acres; they comprise, obviously, naturally occurring geological and vegetative features. However, like the governments in the cases cited by Wyoming Sawmills, the Forest Service is endorsing the religious significance of those features to some American Indians – that is, that they are sacred – thereby violating the Establishment Clause.

In the cases cited by Wyoming Sawmills, what is constitutionally offensive is not the particular symbol or words, but instead the religious significance of those symbols or words. Both *Suhre v. Haywood County*, 131 F.3d 1083 (4th Cir. 1997), and *Anderson v. Salt Lake City Corp.*, 475 F.2d 29 (10th Cir. 1973), for example, involve challenges to placement of the Ten Commandments in a public place. Although the Ten Commandments are just words carved in stone, Jews and Christians believe that the Ten Commandments came directly from God. It is this belief, and the government's endorsement of it, that makes placement of a stone monument containing the Ten Commandments in a public place a violation of the Establishment Clause. *See, Stone v. Graham*, 449 U.S. 39 (1980).

In the Bighorn National Forest, it is not the 50,000 acres of a geological formation to which Wyoming Sawmills objects. Instead, it is the endorsement by the Forest Service of the religious belief of some American Indians that those 50,000 acres are "sacred" and must be placed off

limits that is constitutionally objectionable. The Forest Service's argument to the contrary conflicts with the decisions of this Court and those of the Circuits that the Establishment Clause applies to all religions.

E. Wyoming Sawmills May Maintain A First Amendment Challenge.

The Forest Service declined to defend its earlier argument and the subsequent ruling of the Tenth Circuit in response to that argument that, "*as an artificial person*, [] has not shown how it experienced the kind of constitutional injury found in such cases." *Wyoming Sawmills*, 383 F.3d at 1247; App., 12 (emphasis added). The Forest Service's argument was unsupportable and the decision that resulted from it is indefensible, as Wyoming Sawmills previously established. Petition, 10.

The decision of the Tenth Circuit that Wyoming Sawmills lacks standing to maintain its Establishment Clause challenge conflicts with the decisions of this Court and the Circuits. This Court should grant this Petition to resolve that conflict.

II. THE FOREST SERVICE'S ACTIONS VIOLATE THE ESTABLISHMENT CLAUSE.

The Forest Service argues that the unique trust relationship between the Indian tribes and the United States justifies the Forest Service's "accommodation" of the religious demands of some American Indians. Respondents' Opp., 12. Ironically, the Forest Service relies on *Lyng v. Northwest Indian Cemetery Protective Association*, 485 U.S. 439 (1988), given that this Court, in *Lyng*, refused to grant to the American Indian Tribe what the

Forest Service granted to the American Indian religious advocates in the instant case. Specifically, this Court refused to "accommodate" the religious interests of the Tribe in *Lyng* because to have done so would have violated the Establishment Clause. In fact, *Lyng* made clear that the demands for privacy by American Indians do not justify the government's closure of public lands, even temporarily. *Lyng*, 485 U.S. at 452-53.

Moreover, although not discussed explicitly in *Lyng*, this Court made clear subsequently that purported unconstitutional government endorsement of religion is not a constitutional "accommodation" unless it lifts a "discernable burden" on the free exercise of religion, *Lee v. Weisman*, 505 U.S. 577, 607 (1992), that was "government-created." *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 338 (1987). The Forest Service failed to identify any "discernable burden" that was "government-created" on the free exercise of American Indian religion within the 50,000 acres at issue. Furthermore, even if the Forest Service were attempting to accommodate American Indian religion by removing "discernible burden[s]," which it has never claimed was the purpose of its closure of 50,000 acres of federal land, the "accommodation doctrine" is "not a principle without limits." *Board of Education of Kiryas Joel Village School District v. Grumet*, 512 U.S. 687, 706 (1994). "At some point, accommodation may devolve into an unlawful fostering of religion." *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. at 334-335.

Nevertheless, the decision of the Forest Service to close 50,000 acres of the Bighorn National Forest to timber harvesting because it is a "sacred site" does not implicate

the accommodation doctrine. Instead, in response to the demands for privacy and solitude of American Indian religious practitioners, the very demands that this Court rejected in *Lyng*, the Forest Service prohibited within those 50,000 acres all uses that "detract from the spiritual . . . values associate[d] with [Medicine Mountain]." 10th Cir. App., 304. Thus, as the Forest Service acknowledged in its decision documents, the 20,000 acres of Medicine Mountain and the surrounding 30,000 acres are now managed as a "sacred site." 10th Cir. App., 306. The Forest Service's actions clearly violate the Establishment Clause. *See, Lyng*, 485 U.S. at 429; *Badoni v. Higginson*, 638 F.2d 172 (10th Cir. 1980).

CONCLUSION

For all of the above reasons, this Court must grant this Petition for *Writ of Certiorari*.

Respectfully submitted,

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Submitted June 13, 2005.

(4)

No. 04-1175

In the Supreme Court of the United States

WYOMING SAWMILLS, INC., PETITIONER

v.

UNITED STATES FOREST SERVICE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether petitioner has standing to bring an Establishment Clause challenge to the United States Forest Service's decision to manage a national forest area in a manner that protects its archaeological, cultural, and religious significance, because either (i) the Forest Service's plan allegedly makes timber sales in the area less likely, or (ii) a for-profit corporation is offended by the Forest Service's management of the site.

2. Whether the Forest Service's preservation plan violates the Establishment Clause because it treats the religious significance of the site as one of many factors that it considers in its decisionmaking process.

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v.

UNITED STATES FOREST SERVICE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-23) is reported at 383 F.3d 1241. The opinion of the district court (Pet. App. 24-68) is reported at 179 F. Supp. 2d 1279.

JURISDICTION

The court of appeals entered its judgment on September 20, 2004. A petition for rehearing was denied on December 3, 2004 (Pet. App. 69-70). The petition for a writ of certiorari was filed on March 2, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Medicine Wheel National Historic Landmark is located within the Bighorn National Forest in north-central Wyoming. Pet. App. 4. The Medicine Wheel is a prehistoric stone structure that consists principally of a circle of

stones, 80-feet in diameter, with a large cairn in the center of the circle and 28 spokes of rocks radiating from the center to the rim. *Ibid.* Archaeological evidence indicates a human presence in the area that spans 7500 years. Numerous tepee rings, trails, and other archaeological features are located in the vicinity of the Medicine Wheel. *Ibid.* The Medicine Wheel and nearby Medicine Mountain have significant historical, cultural, and religious significance to many Native Americans Tribes. *Id.* at 4, 25. In 1957, approximately 200 acres of the Bighorn National Forest were set aside "for the protection and preservation of the archaeological values of the Medicine Wheel and adjacent historic area." 22 Fed. Reg. 4135 (1957); see Pet. App. 4, 25. The Medicine Wheel was designated a National Historic Landmark in April 1969. Pet. App. 4.

A significant increase in the flow of visitors to the area in the 1980s generated concern both for the visitors' safety and for preservation of the area's unique features and artifacts. Pet. App. 4. The Forest Service responded by adopting, in 1996, a Historic Preservation Plan for the Medicine Wheel National Landmark and Medicine Mountain (Preservation Plan). That Preservation Plan was the product of more than a decade of development, study, and consultation between the federal government and state, local, and tribal governmental officials and other interested parties. *Id.* at 6-7.

The purpose of the Preservation Plan is "to establish a process for integrating the preservation and traditional use" of the Medicine Wheel area "with the multiple use mission of the Forest Service, in a manner that gives priority to the protection of the historic properties involved by continuing traditional cultural use." Pet. App. 27. The Preservation Plan provides, among other things, for consultation between the Forest Service and other parties to

the Preservation Plan concerning projects proposed within a designated area surrounding the Medicine Wheel. *Id.* at 27-28. That area consists of approximately 18,000 acres of Forest Service land, roughly equivalent to the Medicine Mountain viewshed. *Id.* at 7. The purpose of consultation is to provide for enhanced public input and to ensure consideration of alternative means of minimizing and mitigating the impact of projects on historic resources and traditional cultural uses. *Id.* at 28.

The Plan documents that only 10% of the land in the area of consultation is suited for timber production, and the area historically has had relatively few timber sales. Pet. C.A. App. 347-348. Nevertheless, the Preservation Plan permits timber harvesting within the consultation area as part of a "vegetative management plan" that "limits logging to what is required for maintaining overall health of the Forest." *Id.* at 349; see also Pet. App. 22. No hauling of logs or other commercial products is permitted on Forest Development Road 12, because that road passes within yards of the Medicine Wheel itself. Pet. C.A. App. 349.

Eight years ago, the Forest Service advertised for bids on a timber sale in an area north of Medicine Mountain referred to as Horse Creek. However, the Forest Service cancelled that sale before opening the bids, pending the consultation required by the Preservation Plan, when it learned that the sale would result in logging trucks traversing a portion of the consultation area. See Pet. App. 8, 30. That consultation process exposed "process violations, conflicting data, and incomplete [National Environmental Policy Act] analysis." *Id.* at 30-31. While the Horse Creek sale has not been re-offered, no final decision to cancel the project has been made. *Id.* at 8.

2. Petitioner, a commercial timber company, filed suit challenging the Preservation Plan on Establishment Clause

grounds.[1] The district court concluded that petitioner lacked standing to bring its Establishment Clause claim. Pet. App. 37-48. The district court first found that petitioner was not injured by its corporate exposure to the effects of the Preservation Plan because mere exposure to allegedly impermissible governmental policies alone is insufficient to confer standing. *Id.* at 42-43. The court further questioned "whether a for profit corporation has the capacity to be offended" by mere exposure to governmental conduct. *Id.* at 43. The court did find, however, that petitioner suffered an economic injury arising from the Preservation Plan because petitioner "could potentially have earned the right to log in Big Horns if it submitted a successful bid." *Id.* at 40. The district court nevertheless held that petitioner lacked standing because its lost bidding opportunity would not be redressed by a ruling striking down the Preservation Plan on Establishment Clause grounds. *Id.* at 47-48. The court reasoned that petitioner has never had a "right to log" in the consultation area, and striking the Preservation Plan would not require reopening of the bidding process, let alone make it likely that petitioner would be awarded a logging contract. *Ibid.*

3. The court of appeals affirmed. Pet. App. 1-23. The court first held that, "[a]s an artificial person, [petitioner] has not shown how it experienced the kind of constitutional injury" that might give rise to standing based on exposure to "religious symbolism." The court further held that the federal government's alleged failure to classify and manage federal land "consistently with the Establishment Clause" does not itself amount to an Article III injury. *Id.* at 12. The court accordingly concluded that petitioner suffered

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[1] Petitioner also raised a number of statutory objections to the Preservation Plan, see Pet. App. 48-67, but none of those claims are at issue before this Court.

"no * * * cognizable injury separate from the alleged loss of opportunity for profitable logging." *Ibid.* The court then ruled that the loss of that potential opportunity did not constitute the type of injury to a legally protected interest that conferred Article III standing. *Id.* at 16-17. The court noted that petitioner "has not alleged that it was treated differently from any other timber company" that might be interested in bidding on timber in the area. *Id.* at 15. The court further explained that, because the Forest Service "has complete discretion" over whether to offer the land for timber contracts, petitioner has failed to "show[] that a timber lease would 'likely' become available on the lands within the area of consultation if [petitioner] were to have the [Preservation Plan] set aside." *Id.* at 16. Thus, because "the courts do not have the power to grant the only relief that would rectify the alleged injury," *ibid.*, the court concluded that petitioner lacks standing to bring its Establishment Clause challenge to the Preservation Plan.

ARGUMENT

1. The court of appeals' holding that petitioner lacks standing does not merit this Court's review. This Court held in *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555 (1992), that the "irreducible constitutional minimum of standing" requires that the plaintiff (1) "have suffered an 'injury in fact'" in the form of the "invasion of a legally protected interest," that is both "concrete and particularized" and "actual or imminent, not conjectural or hypothetical"; (2) identify a "causal connection between the injury and the conduct" of which he complains, such that the alleged injury is "fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court"; and (3) show that it is "likely, as opposed to merely speculative, that the injury

will be redressed by a favorable decision." *Id.* at 560-561 (internal quotation marks and citation omitted). Absent the concrete invasion of a legally protected interest, federal courts cannot vindicate "the value interests of concerned bystanders." *Allen* v. *Wright*, 468 U.S. 737, 756 (1984) (quoting *United States* v. *SCRAP*, 412 U.S. 669, 687 (1973)). Instead, plaintiffs must make "a factual showing of perceptible harm." *Lujan*, 504 U.S. at 566.

The decision below reflects a straightforward application of *Lujan*. Petitioner, for its part, does not dispute that *Lujan* provides the proper framework for analysis (see Pet. 8 n.1), or that the court relied on *Lujan* in holding that petitioner lacked standing. Petitioner simply disagrees with the court of appeals' application of settled law to the facts of this case. That case-specific and record-bound determination does not merit further review by this Court.

a. The court of appeals correctly held that petitioner's alleged loss of opportunity to bid on a contract for timber sales in the Preservation Plan area does not confer standing. As the court of appeals held (see Pet App. 13-16), petitioner's claimed injury would not be redressed by a judgment invalidating the Preservation Plan on Establishment Clause grounds. With or without the Preservation Plan, the Forest Service is under no obligation to offer timber sales in the area at issue, and petitioner made no showing that sales would be likely in the absence of the Preservation Plan, much less that petitioner would likely be awarded any timber harvesting contract. See *id.* at 16. Indeed, with respect to the proposed Horse Creek sale, the Forest Service identified a number of barriers to the initial sale plan that were unrelated to the Preservation Plan. See *id.* at 8, 30-31 (noting failure to comply with the

National Environmental Policy Act and other "process violations").[2]

The court of appeals' decision parallels the Eleventh Circuit's decision in *Region 8 Forest Service Timber Purchasers Council* v. *Alcock*, 993 F.2d 800 (1993), cert. denied, 510 U.S. 1040 (1994), in which that court held that timber companies lacked standing to challenge a policy that would allegedly reduce the amount of timber available for future contracts. The Eleventh Circuit reasoned that "no right is conferred on the Timber Companies to harvest a set amount of timber each year," and "Timber Companies have no right to compel the Forest Service to sell any future timber to them." *Id.* at 808.

Petitioner's reliance (Pet. 9) on the Eighth Circuit's decision more than two decades ago in *Arkla Exploration Co.* v. *Texas Oil & Gas Corp.*, 734 F.2d 347 (1984), cert. denied, 469 U.S. 1158 (1985), to demonstrate a circuit conflict warranting this Court's review is misplaced. In that case, the court found that the oil company was injured when

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[2] The decision that petitioner lacks standing was also correct because petitioner did not suffer any legally cognizable injury arising from the Forest Service's decision not to go forward with the Horse Creek timber sale. Petitioner has no "legally protected interest," *Lujan*, 504 U.S. at 560, in having National Forest land opened up for timber sales. The decision to put the timber contracting process on hold thus did not infringe any legal protected interest of petitioner's. In addition, the nexus between the Forest Service's wholly discretionary decision to open National Forest land for timber harvesting, its consultation process, and the ultimate award of a hypothesized timber harvesting contract to petitioner is too remote to support Article III standing. See *ibid.* Indeed, it is hard to understand how, in this Administrative Procedure Act suit, non-final agency action (withdrawing a proposed timber sale for further study) can give rise to a cognizable injury-in-fact. See Pet. App. 51 n.15 (holding that withdrawal of the timber sale was not final agency action).

it was excluded from a bidding process that actually occurred. *Id.* at 353-354. In *Arkla*, unlike the present case, a court order could redress the injury by requiring that the government conduct a lawful bidding process. Here, there has been no sale, nor is any sale scheduled. There thus is no bidding process to correct.[*]

Petitioner's argument (Pet. 8-9) that the court's decision conflicts with rulings of this Court is equally flawed. In *Adarand Constructors, Inc.* v. *Peña*, 515 U.S. 200, 211 (1995) (cited at Pet. 8), the Court held that a "discriminatory [bidding] classification [which] prevent[s] the plaintiff from competing on an equal footing" for Government contracts constituted an injury-in-fact. That is of no help to petitioner, who does not allege any disparity in the treatment of bidders.

Watt v. *Energy Action Education Foundation*, 454 U.S. 151 (1981) (cited at Pet. 8), is even further afield. There, California had standing because a bidding system adopted by the Secretary of the Interior allegedly precluded California from receiving an adequate return on its statutory right to a share of lease royalties. The flawed bidding sys-

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[*] In *Mountain States Legal Foundation* v. *Glickman*, 92 F.3d 1228 (1996), the District of Columbia Circuit held that a lumber company had standing to challenge, on a variety of statutory grounds, final agency action adopting a particular logging plan because the logging cutbacks it permitted would "clearly inflict injury on the firm's economic well-being, which an order reducing the cutbacks would redress." *Id.* at 1233. Petitioner, by contrast, has failed to demonstrate that similarly concrete and immediate economic harms have befallen it or that its economic interests would *likely* be advanced by a court order invalidating the Preservation Plan. In any event, that aspect of the court of appeals' opinion was not necessary to its decision because it found standing on alternative grounds. *Id.* at 1232 ("We find that the plaintiffs have set forth facts showing those [standing] elements in two independent ways.").

tem thus had a concrete and identifiable financial impact on the State that a court could redress. *Id.* at 160-161. Petitioner has no statutory right to a timber contract and no concrete or identifiable financial injury arising from the government's failure to go forward with a competitive bidding process. See also *Bryant* v. *Yellen*, 447 U.S. 352, 367-368 (1980) (cited at Pet. 8) (standing existed because it was "highly improbable" that application of federal law would not directly reduce the price of land that the plaintiffs wished to purchase, and judicial relief would make it "likely" that below-market priced land would become available).

b. The court of appeals also correctly ruled that petitioner's "direct contact" (Pet. 9) with the Preservation Plan did not amount to a cognizable injury. The "psychological consequence presumably produced by observation of conduct with which one disagrees * * * is not an injury sufficient to confer standing under [Article] III, even though the disagreement is phrased in constitutional terms." *Valley Forge Christian Coll.* v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 485-486 (1982). Framing the complaint in terms of unwanted "exposure" to a governmental policy does not change the analysis.

Petitioner's contention (Pet. 9-11) that the court of appeals' decision conflicts with the rulings of other courts is incorrect. First, almost all of the court of appeals' standing cases cited by petitioner (see Pet. 10) predate this Court's decision clarifying the test for Article III standing in *Lujan*.

Second, the decision below, in fact, does not conflict with the decision of any other court of appeals. All of the court of appeals cases cited by petitioner involved governmental displays of sectarian religious symbols on government property. See *Suhre* v. *Haywood County*, 131 F.3d 1083

(4th Cir. 1997) (courtroom display of the Ten Commandments); *Foremaster* v. *City of St. George*, 882 F.2d 1485 (10th Cir. 1989) (inclusion of image of Mormon temple in city logo), cert. denied, 495 U.S. 910 (1990); *Saladin* v. *City of Milledgeville*, 812 F.2d 687 (11th Cir. 1987) (city seal containing the word "Christianity"); *Hawley* v. *City of Cleveland*, 773 F.2d 736 (6th Cir. 1985) (chapel in airport), cert. denied, 475 U.S. 1047 (1986); *ACLU* v. *Rabun County Chamber of Commerce, Inc.*, 698 F.2d 1098 (11th Cir. 1983) (large lighted cross in state park); *Anderson* v. *Salt Lake City Corp.*, 475 F.2d 29 (10th Cir.) (courthouse display of the Ten Commandments), cert. denied, 414 U.S. 879 (1973); *Allen* v. *Hickel*, 424 F.2d 944 (D.C. Cir. 1970) (creche in federal park).

This case does not involve the display of any religious item or symbol on government property. The Medicine Wheel itself is not a governmental display of a religious symbol on property; it is property in its natural state, and the state in which it has been since time immemorial. The Preservation Plan likewise is not a public display of a religious symbol, and it does not require petitioner to undertake exceptional efforts or to forgo governmental services to avoid exposure to it. Indeed, the gist of petitioner's complaint is that it desires closer contact with the Medicine Wheel area, not that the government has erected a display or exposed it to religious symbols or rituals that it wishes to avoid. Compare *City of Edmond* v. *Robinson*, 517 U.S. 1201, 1201-1203 (1996) (Rehnquist, C.J., Scalia & Thomas, JJ., dissenting from the denial of certiorari) (discussing conflict in the circuits on Article III standing to challenge "expos[ure] to a state symbol that offends his beliefs"). Beyond that, the Court could not resolve the standing issue that petitioner frames without first addressing whether a for-profit timber company, which is suing in its own right

and not in any representative capacity, can suffer the type of psychic offense that might give rise to Article III standing to challenge a religious display.

The issue presented in this case is distinct and much narrower than that presented in the cases petitioner cites. The issue is whether witnessing governmental displays of respect in its land-management policies for the religious and cultural beliefs of Indian Tribes to which the federal government has a unique trust responsibility, see *Morton* v. *Mancari*, 417 U.S. 535 (1974), invades a cognizable, legally protected interest. Not one of the decisions from the other courts of appeals cited by petitioner presented, raised, or decided that question. There thus is no conflict in the circuits warranting this Court's review. Indeed, the petition echoes the arguments advanced in the petitions for a writ of certiorari in *DeWaal* v. *Alston*, 125 S. Ct. 1294 (2005), and *Bear Lodge Multiple Use Association* v. *Babbitt*, 529 U.S. 1037 (2000), in which this Court denied review.

2. Petitioner's Establishment Clause challenge (Pet. 14-18) to the Preservation Plan does not merit this Court's review. Neither the district court not the court of appeals addressed the Establishment Clause question, so it is not properly positioned for this Court's review. See *Cutter* v. *Wilkinson*, No. 03-9877 (May 31, 2005), slip op. 8 n.7. Furthermore, no other court of appeals has addressed whether such plans violate the Establishment Clause. There thus is no conflict in the circuits that necessitates this Court's review at this time.

The Preservation Plan, moreover, fully comports with this Court's precedent. In *Zorach* v. *Clauson*, 343 U.S. 306 (1952), this Court upheld against an Establishment Clause challenge a program of releasing students early from public elementary school classes so that they could attend inde-

pendently sponsored religion classes. In so holding, the Court explained that government "follows the best of our traditions" when it "respects the religious nature of our people and accommodates the public service to their spiritual needs." *Id.* at 314. The Establishment Clause does not require government to operate its programs with "callous indifference to religious groups," for "[t]hat would be preferring those who believe in no religion over those who do believe." *Ibid.*

Moreover, the government's longstanding trust responsibility for Native American Tribes makes this type of measured and calibrated accommodation of the cultural and religious interests of Tribes on land that historically belonged to them particularly appropriate. In *Lyng* v. *Northwest Indian Cemetery Protective Association*, 485 U.S. 439, 454 (1988), the Court acknowledged that the government has discretion to accommodate religious practices and noted approvingly that the government in that case "ha[d] taken numerous steps * * * to minimize the impact that construction of the * * * road [on federal land] will have on the Indians' religious activities." *Ibid.* In words that speak directly to the constitutionality of the Preservation Plan at issue here, the Court affirmed that "[t]he Government's rights to the use of its own land, for example, need not and should not discourage it from accommodating religious practices like those engaged in by the Indian respondents." *Ibid.*

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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